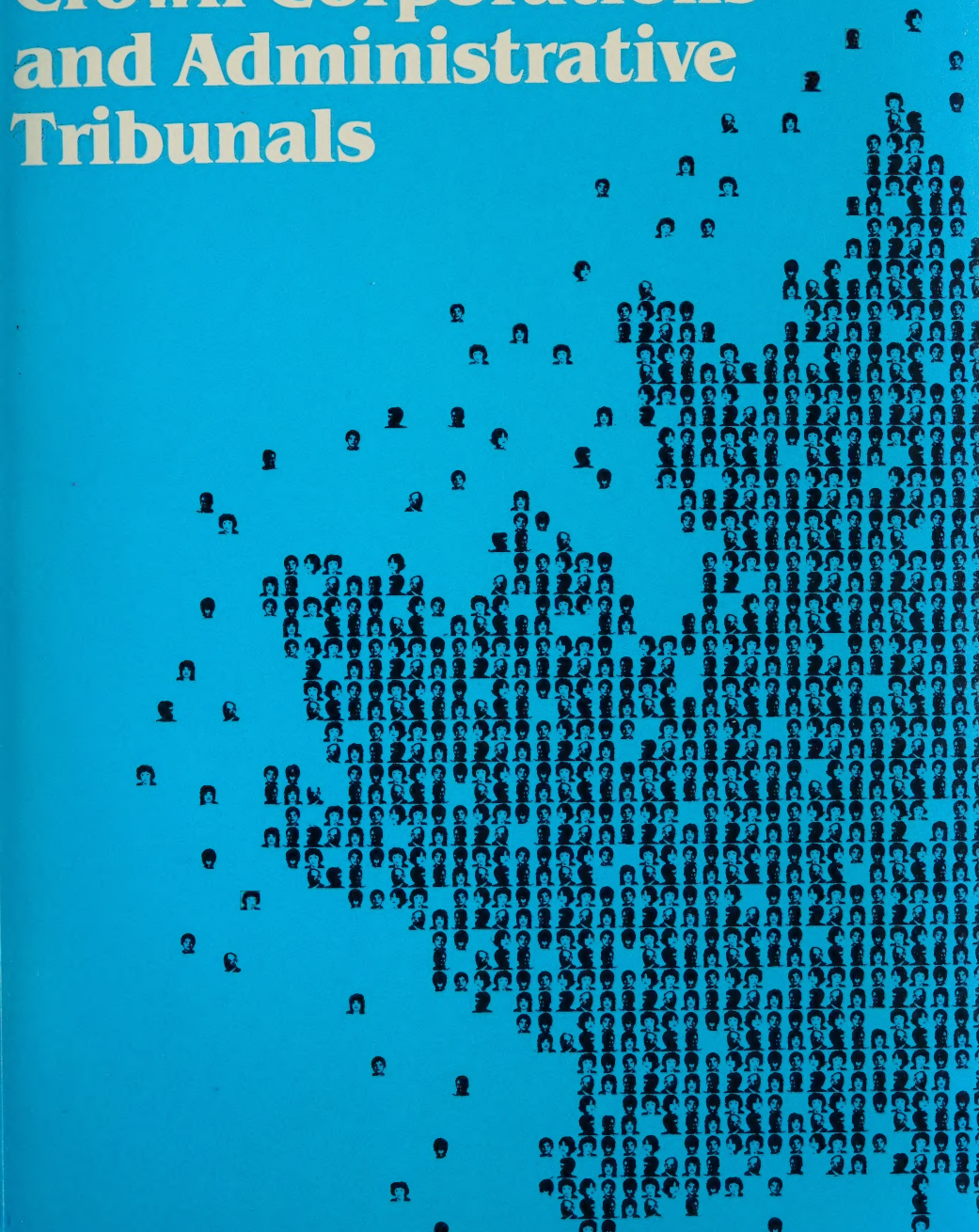
IVAN BERNIER and ANDRÉE LAJOIE,
Research Coordinators

Regulations, Crown Corporations and Administrative Tribunals



Regulations, Crown Corporations and Administrative Tribunals

This is Volume 48 in the series of studies commissioned as part of the research program of the Royal Commission on the Economic Union and Development Prospects for Canada.

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IVAN BERNIER
AND
ANDRÉE LAJOIE
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CONTENTS

When the members of the Rowell-Sirois Commission began their collective task in 1937, very little was known about the evolution of the Canadian economy. What was known, moreover, had not been extensively analyzed by the slender cadre of social scientists of the day.

When we set out upon our task nearly 50 years later, we enjoyed a substantial advantage over our predecessors; we had a wealth of information. We inherited the work of scholars at universities across Canada and we had the benefit of the work of experts from private research institutes and publicly sponsored organizations such as the Ontario Economic Council and the Economic Council of Canada. Although there were still important gaps, our problem was not a shortage of information; it was to interrelate and integrate — to synthesize — the results of much of the information we already had.

The mandate of this Commission is unusually broad. It encompasses many of the fundamental policy issues expected to confront the people of Canada and their governments for the next several decades. The nature of the mandate also identified, in advance, the subject matter for much of the research and suggested the scope of enquiry and the need for vigorous efforts to interrelate and integrate the research disciplines. The resulting research program, therefore, is particularly noteworthy in three respects: along with original research studies, it includes survey papers which synthesize work already done in specialized fields; it avoids duplication of work which, in the judgment of the Canadian research community, has already been well done; and, considered as a whole, it is the most thorough examination of the Canadian economic, political and legal systems ever undertaken by an independent agency.

The Commission's Research Program was carried out under the joint direction of three prominent and highly respected Canadian scholars: Dr. Ivan Bernier (*Law and Constitutional Issues*), Dr. Alan Cairns (*Politics and Institutions of Government*) and Dr. David C. Smith (*Economics*).

Dr. Ivan Bernier is Dean of the Faculty of Law at Laval University. Dr. Alan Cairns is former Head of the Department of Political Science at the University of British Columbia and, prior to joining the Commission, was William Lyon Mackenzie King Visiting Professor of Canadian Studies at Harvard University. Dr. David C. Smith, former Head of the Department of Economics at Queen's University in Kingston, is now Principal of that University. When Dr. Smith assumed his new responsibilities at Queen's in September, 1984, he was succeeded by Dr. Kenneth Norrie of the University of Alberta and John Sargent of the federal Department of Finance, who together acted as co-directors of Research for the concluding phase of the Economics research program.

I am confident that the efforts of the Research Directors, research coordinators and authors whose work appears in this and other volumes, have provided the community of Canadian scholars and policy makers with a series of publications that will continue to be of value for many years to come. And I hope that the value of the research program to Canadian scholarship will be enhanced by the fact that Commission research is being made available to interested readers in both English and French.

I extend my personal thanks, and that of my fellow Commissioners, to the Research Directors and those immediately associated with them in the Commission's research program. I also want to thank the members of the many research advisory groups whose counsel contributed so substantially to this undertaking.

DONALD S. MACDONALD

At its most general level, the Royal Commission's research program has examined how the Canadian political economy can better adapt to change. As a basis of enquiry, this question reflects our belief that the future will always take us partly by surprise. Our political, legal and economic institutions should therefore be flexible enough to accommodate surprises and yet solid enough to ensure that they help us meet our future goals. This theme of an adaptive political economy led us to explore the interdependencies between political, legal and economic systems and drew our research efforts in an interdisciplinary direction.

The sheer magnitude of the research output (over 280 separate studies in 72 volumes) as well as its disciplinary and ideological diversity have, however, made complete integration impossible and, we have concluded, undesirable. The research output as a whole brings varying perspectives and methodologies to the study of common problems and we therefore urge readers to look beyond their particular field of interest and to explore topics across disciplines.

The three research areas, *Law and Constitutional Issues*, under Ivan Bernier, *Politics and Institutions of Government* under Alan Cairns, and *Economics* under David C. Smith (co-directed with Kenneth Norrie and John Sargent for the concluding phase of the research program) — were further divided into 19 sections headed by research coordinators.

The area *Law and Constitutional Issues* has been organized into five major sections headed by the research coordinators identified below.

- Law, Society and the Economy — *Ivan Bernier and Andrée Lajoie*
- The International Legal Environment — *John J. Quinn*

- The Canadian Economic Union — *Mark Krasnick*
- Harmonization of Laws in Canada — *Ronald C.C. Cuming*
- Institutional and Constitutional Arrangements — *Clare F. Beckton and A. Wayne MacKay*

Since law in its numerous manifestations is the most fundamental means of implementing state policy, it was necessary to investigate how and when law could be mobilized most effectively to address the problems raised by the Commission's mandate. Adopting a broad perspective, researchers examined Canada's legal system from the standpoint of how law evolves as a result of social, economic and political changes and how, in turn, law brings about changes in our social, economic and political conduct.

Within *Politics and Institutions of Government*, research has been organized into seven major sections.

- Canada and the International Political Economy — *Denis Stairs and Gilbert Winham*
- State and Society in the Modern Era — *Keith Banting*
- Constitutionalism, Citizenship and Society — *Alan Cairns and Cynthia Williams*
- The Politics of Canadian Federalism — *Richard Simeon*
- Representative Institutions — *Peter Aucoin*
- The Politics of Economic Policy — *G. Bruce Doern*
- Industrial Policy — *André Blais*

This area examines a number of developments which have led Canadians to question their ability to govern themselves wisely and effectively. Many of these developments are not unique to Canada and a number of comparative studies canvass and assess how others have coped with similar problems. Within the context of the Canadian heritage of parliamentary government, federalism, a mixed economy, and a bilingual and multicultural society, the research also explores ways of rearranging the relationships of power and influence among institutions to restore and enhance the fundamental democratic principles of representativeness, responsiveness and accountability.

Economics research was organized into seven major sections.

- Macroeconomics — *John Sargent*
- Federalism and the Economic Union — *Kenneth Norrie*
- Industrial Structure — *Donald G. McFetridge*
- International Trade — *John Whalley*
- Income Distribution and Economic Security — *François Vaillancourt*
- Labour Markets and Labour Relations — *Craig Riddell*
- Economic Ideas and Social Issues — *David Laidler*

Economics research examines the allocation of Canada's human and other resources, how institutions and policies affect this allocation, and the

distribution of the gains from their use. It also considers the nature of economic development, the forces that shape our regional and industrial structure, and our economic interdependence with other countries. The thrust of the research in economics is to increase our comprehension of what determines our economic potential and how instruments of economic policy may move us closer to our future goals.

One section from each of the three research areas — The Canadian Economic Union, The Politics of Canadian Federalism, and Federalism and the Economic Union — have been blended into one unified research effort. Consequently, the volumes on Federalism and the Economic Union as well as the volume on The North are the results of an interdisciplinary research effort.

We owe a special debt to the research coordinators. Not only did they organize, assemble and analyze the many research studies and combine their major findings in overviews, but they also made substantial contributions to the Final Report. We wish to thank them for their performance, often under heavy pressure.

Unfortunately, space does not permit us to thank all members of the Commission staff individually. However, we are particularly grateful to the Chairman, The Hon. Donald S. Macdonald, the Commission's Executive Director, Gerald Godsoe, and the Director of Policy, Alan Nymark, all of whom were closely involved with the Research Program and played key roles in the contribution of Research to the Final Report. We wish to express our appreciation to the Commission's Administrative Advisor, Harry Stewart, for his guidance and advice, and to the Director of Publishing, Ed Matheson, who managed the research publication process. A special thanks to Jamie Benidickson, Policy Coordinator and Special Assistant to the Chairman, who played a valuable liaison role between Research and the Chairman and Commissioners. We are also grateful to our office administrator, Donna Stebbing, and to our secretarial staff, Monique Carpentier, Barbara Cowtan, Tina DeLuca, Françoise Guilbault and Marilyn Sheldon.

Finally, a well deserved thank you to our closest assistants, Jacques J.M. Shore, *Law and Constitutional Issues*; Cynthia Williams and her successor Karen Jackson, *Politics and Institutions of Government*; and I. Lilla Connidis, *Economics*. We appreciate not only their individual contribution to each research area, but also their cooperative contribution to the research program and the Commission.

IVAN BERNIER
ALAN CAIRNS
DAVID C. SMITH

This volume of research is part of the output of the Royal Commission's research program on Law and Constitutional Issues, and falls within the section entitled Law, Society and the Economy. This section serves as both an introduction and background to all the Commission's research on law. It analyzes how law has evolved under the pressure of social and economic changes and how it in turn has brought about changes in our social and economic conduct. Our objective was to highlight the relationship of law to the state, society and the economy. Our ultimate aim was to show how law affects Canadian society and to reveal its potential and limitations as an instrument for implementing government policy. In particular, we have addressed criticisms that focus on the multiplication of laws, regulations and tribunals as instruments of state intervention; on the complexity of our legal system and its essentially conflictual nature; and on the confusing character of the law and its apparent incapacity to respond to the needs of all Canadians.

We trust that with the inventory taken and the conclusions drawn in this section, we have provided the Commission with insight into one of the most fundamental issues confronting it — the role of the state in Canadian society. For to ask what is the role of the state is to also question the role of the law.

The three studies included in this volume are particularly interesting in that they deal with legal instruments — regulations, administrative tribunals, Crown corporations — that are closely associated with the phenomenal growth of government in the last twenty-five years. It is not surprising that extensive studies of the administrative process have taken place recently that have involved a careful examination of the legal forms

of government intervention. More often than not, however, as the authors of this volume point out, these studies have emphasized almost exclusively the need for control mechanisms to reduce government involvement in various spheres and to promote a greater degree of accountability. The three studies presented here adopt a wider perspective. They define the issues not so much in terms of whether there is too much delegated legislation or not enough accountability in administrative tribunals and Crown corporations, but rather in terms of where these instruments fit in the arsenal of tools at the disposal of governments, what they provide, and how they can best be put to work. They also emphasize the relationship between law and values.

While covering a broad range of activities, these three studies challenge readily accepted views about the role and scope of administrative law and tribunals in Canada. Some of the opinions expressed are bound to attract reactions — such as Dean Roderick Macdonald's assertion that deregulation is a chimera, Professor Patrice Garant's suggestion that immunities and privileges of Crown corporations should be eliminated, and Professor David Mullan's conclusion that the creation of administrative tribunals is justified by the need for dispersal of power in a system which would otherwise concentrate too much authority in a limited group of actors. For those who want to go beyond the conventional wisdom of the day in order to understand what may lie ahead, such contributions will prove most useful.

I take this opportunity to thank Professor Andrée Lajoie for her valuable assistance and participation as Co-coordinator of this section of the Law and Constitutional Issues Research Program.

IVAN BERNIER

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I.B.

1

Crown Corporations: *Instruments of Economic Intervention — Legal Aspects*

PATRICE GARANT

Introduction

If we establish the public corporation, it must be for certain reasons. What are they? They are that we seek to combine the principle of public accountability, of a consciousness on the part of the undertaking that it is working for the nation and not for sectional interests, with the liveliness, initiative, and a considerable degree of the freedom of a quick-moving and progressive business enterprise. Either that is the case for the public corporation, or there is no case at all.

Lord Morrison of Lambeth

When the state decides to intervene in the private sector, it usually uses one of five methods: taxation, economic regulation or control, financial or technical assistance, and the granting of contracts and the creation or takeover of companies. The state uses three types of instruments to achieve its ends. It can intervene in the economy through its ministries and regulatory agencies; it can make use of private enterprise by granting contracts or financial assistance; and finally, it can establish companies, which are known as public corporations or, more precisely, Crown corporations. Such corporations fall somewhere between government institutions in the strict sense and private sector companies.

Thus a public company is a legal instrument of state intervention in the economy. In addition, when governments choose this means of intervention, an entire legal framework is envisaged running parallel to the economic framework, the social framework, and so on. The choice of a particular type of intervention and its implementation is of interest to the lawyer because such a choice requires a constitutional, legislative or regulatory basis, as well as a legal framework for allocating responsibilities and powers and for providing control mechanisms.

The creation of public companies or the majority takeover of companies, which thereby become part of the public sector, is a direct means of intervening in the economy that has become increasingly common both at the federal level and in some provinces, even though no existing government openly advocates socialism or interventionism. Such a choice has sometimes seemed the best way of achieving certain objectives or the best solution under the circumstances; in other cases, it has seemed to be the only possible or valid choice.

The Crown corporation made its appearance rather late in the political and administrative history of Canada. The first corporations, mainly in the fields of transportation and communications, were established between the two wars (CN, the CBC, Air Canada), but it was not until the Second World War that this form of intervention first occurred on a large scale in order to support Canada's war effort. Legally, this was a very important period because the legal instruments and techniques that were used were decisive for the future of the system; thus techniques of private law were widely used for the creation, the incorporation and the control of these new corporations.

After 1945, many of the wartime companies were dismantled or privatized, but several did survive, as did other companies in socially or economically strategic sectors, such as energy, aeronautics, the financing of residential construction, industrial and commercial financing, and the marketing of natural resources.

Since 1945 it cannot be said that the law as it pertains to public corporations has been clear and coherent. In fact, at the end of the Second World War the situation was nebulous, and special laws enacted in the years immediately after the war brought little improvement.[1] On the other hand, general legislation enacted between 1946 and 1953 led to a consolidation and clarification that were more satisfactory with respect to the legal format and to the control of Crown corporations; this legislation included the Government Companies Operation Act in 1946, the Statute Law Amendment Act in 1950, the Financial Administration Act in 1951, and the Crown Liability Act in 1953.

During the period of prosperity and economic growth from 1955 to about 1975, federal Crown corporations increased in number and especially in size, but they did so discreetly. The federal public sector became, through parent corporations and their networks of subsidiaries, an impressive industrial, commercial and financial empire. There was, however, little evolution in a legal sense during this period except that every, or almost every, parent corporation was provided with a constituent act adapted to its needs and objectives. On the whole, however, the salient feature of this period was confusion and some incoherence; it is almost impossible to explain, let alone justify, the essential characteristics of legal status, define the mandates, powers and immunities, and summarize the systems of control that were provided for in the legislation and that were in fact used.

The year 1975 was a turning point in the evolution of our public enterprise system. First of all, it became evident that the government's system of financial management and control of public finances was in disarray; this gave rise to a reform of the Auditor General's status and the setting up of the Royal Commission on Financial Management and Accountability (Lambert Commission). The public became aware of the financial and administrative difficulties that some Crown corporations were experiencing; parliamentary debates concerning the CBC, Air Canada, CN, the Canada Development Corporation, Atomic Energy of Canada, the aircraft industry, and so on became even more heated. Finally, the creation of Petro-Canada raised an outcry that continued until the early 1980s. The upheaval of the late 1970s resulted, after the report of the Lambert Commission, in various attempts at legislative reform between 1979 and 1984.

The law is supposed to be a clear and coherent factor in the organization and operation of institutions, but it would seem that this has not always been the case with respect to Crown corporations, especially at the federal level.

At the provincial level, especially in Quebec, the situation of Crown corporations evolved differently. It was really after the Quiet Revolution of the 1960s that the first large Quebec Crown corporations appeared, and for the next twenty years this public economic sector grew constantly. The legal rules governing these institutions constantly evolved to become clearer and more coherent. Successive governments made constant efforts at rationalization that undeniably bore fruit. This did not occur without certain failures attributable in large part to the economic situation and to purely political constraints, but although it is not perfect, the situation is in many ways satisfactory.

In a liberal economy and in a democratic and parliamentary system, a public company at the government level or a Crown corporation arouses concern if not dismay on the part of many economic agents for two reasons. On the one hand, questions arise about the legal status of these companies, in other words, their legal structure, their powers and especially their privileges; their significance; and, in particular, their purpose. On the other hand, there is concern about the relationships of control that exist or should exist between those who hold political power in the state, that is, the government and Parliament, and those enterprises involved in economic activities that are becoming more and more pervasive, with impressive budgets and sometimes impressive deficits, and, especially, those whose role tends to go beyond that of a simple profit-making private company.

The legal framework, as it is seen today, consists of a subtle combination of ingredients that allow a public corporation to be efficient and profitable, and the government to exercise sufficient control to enable the company to be the means of implementing the government's policies. There is, to a certain extent, a basic contradiction between the fact that it is both

a company similar in many ways to any other company and that it is part of the public sector. Any definition of the status and legal structure of a public corporation must take this twofold character into account.

The public corporation is an important instrument of economic intervention whose success or usefulness may depend on a balance between, on the one hand, the means, that is, all the legal rules and principles that define its status, structure, privileges and controls, and on the other hand, the purpose, that is, the objectives defined by statute or the public authority. To understand these considerations, we must analyze and define Canadian law, both federal and provincial, as it pertains to the status of the public corporation at the government level and to the system of controls exercised by the higher authorities. The discussion of provincial law will concentrate on Quebec.

For the purposes of this paper, Crown corporations are companies in the ordinary sense of the term, whose mandate relates to industrial, commercial or financial activities but which also belong to the state, are owned by the government or the Crown or whose sole shareholder is the government or the Crown. This also includes wholly owned subsidiaries. Such companies must be considered part of the governmental public sector: they belong to the state and are exclusively controlled by it.

On the other hand, institutions that are really administrative bodies rather than companies should be excluded from the family of Crown corporations: for example, organizations concerned with economic or social regulation, administrative management and consultation. On the other hand, semi-public companies, that is, majority or even minority subsidiaries in which there is co-participation of public and private capital, are not Crown corporations, although they are often similar to them.

This conception of the Crown corporation is fairly similar to that adopted by the Lambert Report in 1979, and it is also a fairly good reflection of the recent evolution of law in force in spite of certain ambiguities.

The main ambiguity arises from the notion of the Crown corporation derived from the former section 66 of the Financial Administration Act. The three-part distinction made between departmental corporation, proprietary corporation and authorized agent was far from satisfactory. Bill C-24 of June 29, 1984 proposed that this notion be abandoned and replaced it with that of the "Crown corporation," which it contrasts with "établissement public" or "departmental corporation," which are really incorporated administrations rather than corporations.

According to Bill C-24, "Crown corporation" has the meaning assigned by section 95 and includes parent Crown corporations and wholly owned subsidiaries. A wholly owned subsidiary "means a corporation that is wholly-owned by one or more parent Crown corporations directly or indirectly through any number of subsidiaries each of which is wholly-owned directly or indirectly by one or more parent Crown corporations." These

definitions seem satisfactory and correspond to the basic definition proposed above both for the federal level and for Quebec.

The notion of a public corporation is broader than that of a Crown corporation. It can apply to other levels of government such as the municipal level; it can also, if necessary, apply to semi-public companies. In this paper however, the term public corporation will be used as a synonym for Crown corporation.

And finally, Bill C-24 does not apply to Crown corporations of a cultural nature such as the Canadian Broadcasting Corporation, the Canadian Film Development Corporation, the National Arts Centre and the Canada Council: another skeletal law is contemplated for these corporations. Nor does it apply to the Bank of Canada, the International Development Research Centre or the Canadian Wheat Board; it is felt that the special functions of these institutions require special treatment.

The Legal Status of Public Corporations

The creation of Crown corporations, by whatever legal instrument, raises constitutional problems: what are the principles and rules that govern what we commonly call nationalization? After dealing with this question, we will turn our attention to the corporate status of a public corporation. Finally, we will deal with the problem of defining Crown agent or government mandatary, which includes most government corporations, with their attendant privileges and immunities. This will help us to understand the differences between a private corporation and a Crown corporation of comparable size.

The Creation of Crown Corporations

Forms and Instruments of Nationalization

The term nationalization, which is most often used in case law and in texts, has no precise legal meaning in Canada. In case law it has a broad meaning that includes both expropriation-nationalization and voluntary nationalization.

Subject to the Charter of Rights and Freedoms, Parliament is supreme. However, the Charter says absolutely nothing about the right to private property or with respect to the private sector, although there have recently been attempts to extend the "right to liberty and security" granted by section 7, to the protection of property.[2] Voluntary nationalization is almost unlimited by virtue of a fundamental principle of public law, which confers upon the Crown, or the government, an unlimited capacity to make contracts.[3] However, if the government wants to acquire a company against the owner's wishes, it must expropriate it: this requires enabling

legislation pursuant to another principle of our public law derived from the common law.

There have not been many nationalization-expropriation laws, but some have had spectacular political repercussions: the 1920 federal statute that nationalized part of the Canadian railway system; the 1944 Quebec statute that created Hydro-Québec and expropriated an existing electricity and gas company; the 1949 federal statute that created Teleglobe-Canada and expropriated Canadian Marconi; the British Columbia statute that created BC Electric and expropriated the electricity companies; the 1978–79 statute that created the Société nationale de l'amiante by nationalizing the Asbestos Corporation, a subsidiary of General Dynamics (USA). These statutes rely in part on generally applicable expropriation techniques but at the same time contain special provisions. For example, the identification of the expropriated object will vary and compensation will be fixed by law or decided by a court of law or by an arbitration board; the law also specifies the criteria for determining compensation, etc.

Many of these laws have been the object of legal challenges, and this has given rise to case law that sets certain rules regarding the constitutional authority of each level of government to extend its economic public sector.

The Constitutional Division of Legislative Jurisdictions and the Expansion of the Economic Public Sector

It is mainly sections 91, 92 and 95 of the Constitution Act, 1867, amended in 1982, that allocate federal and provincial legislative powers in economic matters. The divisions of power have been interpreted in an extensive and well-known body of case law.

With regard to the expansion of the economic public sector, the allocation of legislative powers can be categorized according to areas — some of which are concurrent — techniques or means, and objectives. The following list gives an overview of the situation.

Federal Legislative Jurisdiction

(a) Areas
- Interprovincial and international trade and transport
- Aeronautics
- Telecommunications
- Postal service
- Navigation and fisheries
- Agriculture (concurrent)
- Federal public property

(b) Means and Techniques
- Companies

- Direct and indirect taxation except taxation of non-renewable natural resources, forestry resources and electrical energy

(c) Objectives
- Peace, order and good government of Canada, that is, emergency powers, the theory of national dimensions, residual powers
- Declare a work or undertaking located in a province, e.g., nuclear energy, to be to the general advantage of Canada

Provincial Legislative Jurisdiction

(a) Areas
- Property and civil rights in the province including industry, commerce and intraprovincial transport
- Prospecting and mining, conservation and management of non-renewable natural resources, forestry resources and electrical energy (except nuclear energy) and interprovincial export (concurrently with the federal government)
- Agriculture (concurrent)
- Provincial public property

(b) Techniques and Means
- Companies with provincial objectives
- Direct taxation only and taxation of non-renewable natural resources, forestry resources and electrical energy

This relatively complex division of state powers leaves unanswered certain questions of great concern to Crown corporations. Can one level of government establish public corporations in a field in which it does not have legislative jurisdiction? To what extent does provincial legislation apply to federal Crown corporations and vice versa? Can one level of government proceed with expropriation-nationalization without regard to the division of legislative powers? How do taxation laws affect Crown corporations that fall within the jurisdiction of one level of government or the other?

A fundamental principle of our constitutional law states that legislative competence and public property are distinct and independent concepts and realities in the sense that property rights do not flow from legislative jurisdiction in a given matter.[4] Therefore, one level of government can acquire the ownership of companies or create companies that lie outside its legislative jurisdiction. That is not so, however, in the case of expropriation or expropriation-nationalization because, under common law, the power to expropriate is essentially statutory and must therefore be based on a specific legislative power.[5] Therefore, the provinces have a broader power of expropriation than the federal government by virtue of s. 92(13) of the Constitution Act, 1867, which covers all industrial and commercial activity.

If it relates to an area of provincial legislative jurisdiction, then, a provincial expropriation-nationalization law will be perfectly valid even if it could affect an area of federal jurisdiction. The Supreme Court ruled in *Canadian Indemnity v. A.G. British Columbia* that the nationalization of the automobile insurance industry in British Columbia came under property and civil rights in the province even though the nationalized companies did business interprovincially and internationally.[6] More recently, the Quebec Court of Appeal ruled that the nationalization of Asbestos Corporation came within the province's jurisdiction over natural resources and did not infringe upon the regulation of exports, even though it did have a considerable effect since virtually all of the production was exported.[7] Federal legislative jurisdiction is infringed upon only if the provincial legislature, by means of nationalization legislation, controls exports directly — in other words, if it controls international trade, as the Government of Saskatchewan has done in the potash case — or if its scope is extraprovincial as in the case of the Newfoundland Revision Act.[8]

On the other hand, expropriation-nationalization must not lead to the absolute "sterilization" of a federally incorporated company. Although at first that rule was strictly construed in the case of the nationalization of electricity in British Columbia,[9] it has subsequently been interpreted so liberally by the Supreme Court of Canada and by the Quebec Court of Appeal that a federally incorporated company can find itself completely paralyzed by a provincial law.[10] This amounts to saying that such a law cannot control the corporate structure by, for example, expropriating shares, but it can transfer all the assets to another legal entity.

Compensation that normally accompanies expropriation under ordinary civil law — in Quebec, the Code of Civil Procedure and the Civil Code — can be denied or fixed by the expropriation legislation since compensation is not a constitutional requirement. The Quebec Court of Appeal so ruled in the Asbestos Corp. nationalization case.[11]

The issue of federal Crown corporations being subject to provincial legislation and provincial Crown corporations being subject to federal legislation is complex because it involves privileges and prerogatives enjoyed by corporations designated as Crown agents or government mandataries, as we shall see further on. Nevertheless, it seems that provincial Crown corporations are bound by federal legislation when they operate in areas of federal legislative jurisdiction: this seems to be what the Supreme Court held in the case of the nationalization of Pacific Western Airlines by the Alberta government.[12] However, the most controversial question is whether the federal Parliament can limit the expansion of activities in the provincial economic public sectors over which it has legislative jurisdiction, e.g., aeronautics, telecommunications, interprovincial transport and energy exports.

In 1972, a federal government regulation with respect to broadcasting under section 22 of the Broadcasting Act prohibited the Canadian Radio-

television and Telecommunications Commission (CRTC) from issuing broadcasting licences to provincial governments or provincial Crown agents. It allowed licences to be issued only to independent corporations, in other words, those not directly controlled by a provincial government.

In 1977, the Aeronautics Act was amended to require the approval of the Governor in Council for any transfer of the capital stock of an air carrier to a provincial government or to one of its agents or to a corporation controlled by either.[13]

In 1982, the government introduced in the Senate the now famous Bill S-31, the purpose of which is, subject to an exemption decreed by the federal government, to prevent any provincial government or one of its public corporations from owning more than 10 percent of the shares of a corporation engaged in interprovincial or international transportation or of a pipeline company covered by Part III of the National Energy Board Act.[14] The Aeronautics Act has also been amended to allow the Canadian Transport Commission to suspend or cancel any licence of an air carrier that does not abide by these provisions.

From a purely constitutional point of view, it is said that this bill was necessary because of the Supreme Court's decision in the Pacific Western Airlines case. According to the federal minister of Consumer and Corporate Affairs, the decision means that "the airlines owned and controlled by a provincial government cannot be submitted to the federal government regulations by virtue of the principle of the sovereignty of the provincial Crowns."[15] It is feared that this ruling could be extended to interprovincial and international transportation, thereby removing large sectors of transportation from federal jurisdiction. However, there is no basis for such fears.

In its 1978 decision, the Supreme Court did not go so far as to hold that the Aeronautics Act does not apply to airlines owned by a provincial government. On the contrary, it held that a provincial government can invoke section 16 of the federal Interpretation Act to avoid the application of certain provisions of this act.[16]

On the other hand, the case law has always held that the federal Parliament can make a law apply specifically to the provincial Crown: "It is, of course, open to Parliament to embrace the provincial Crown in its competent legislation if it chooses to do so."[17]

Finally, it appears to me that for a long time, in fact, until the 1978 Supreme Court decision, case law held that certain federal laws of general application did apply to provincial governments unless they could invoke a specific prerogative or privilege.[18]

In any case, it is clear that Parliament can circumvent the prerogative conferred by section 16 of the Interpretation Act by stipulating in each statute that it applies to the Crown or to the Crown in right of each province and to Crown agents. Provincial Crown corporations would then be on the same footing as any other private company with respect to the Aero-

nautics Act, the Transport Act, the Broadcasting Act and the National Energy Board Act. Parliament would then exercise its full legislative jurisdiction over provincial Crown corporations by regulating their activities just as it regulates those of any private company.

There is no constitutional reason for the 1972 order for the 1977 amendments to the Aeronautics Act or for Bill S-31. The real policy reasons upon which they are based are economic and are certainly debatable. Aside from motives of the "witch hunt" variety, such as the fear of socialism or of separatism, the only reason that would stand up to analysis would be the fear that a provincial Crown corporation, as an instrument of a provincial government's policies, would work against national or federal policies. However, federal laws give the federal government and federal regulatory bodies such as the CRTC, the Canadian Transport Commission and the National Energy Board the means of ensuring that the objectives of the federal legislation are respected and implemented. In certain economic sectors such as energy and resources, the major Crown corporations are bound by federal legislation. Why should it be otherwise with respect to broadcasting and transportation?

No one has ever proved, or attempted to prove, that provincial Crown corporations are not as good corporate citizens as federal Crown corporations or as large private companies like Bell Canada, Canadian Pacific, Alcan or the chartered banks. As long as that has not been proved, the federal "malthusianism" as applied to provincial Crown corporations should be considered misplaced, if not odious. Bill S-31 is not only constitutionally incongruous but, as A. Tupper has suggested, "a mixture par excellence of bad politics and inadequate economics."[19]

The Corporate Status of Crown Corporations

There are three important issues to be considered with respect to legal entities that are established for industrial, commercial or financial purposes and that are separate from the government. First, what are the specific purposes of the incorporation? Second, what means of incorporation are used and which are best suited to the results expected? Finally, what impact does company law have on Crown corporations in light of the rules of public law that, in any event, apply to such corporations?

The Specific Goals of Incorporation

The 1977 blue paper as well as the Lambert Report assumed that incorporation was specifically designed to provide the autonomy that is essential for the efficient management of industrial, commercial or quasi-commercial companies:

> It is clear that by adopting this structure for incorporating companies, governments intend to profit from the autonomy, flexibility and special powers that allow private sector corporations to operate successfully.
>
> The corporate structure constitutes a proven way to ensure efficient management of certain types of activity; that is why the government relies on this formula . . . .[20] (Translation)

Recently, this idea has become quite popular. In 1981, the Post Office Department became the Canada Post Corporation. More recently in Quebec, a bill proposed the creation of a Société immobilière du Québec to replace the Ministère des travaux publics et de l'équipement. And, in 1983, the government created the Société québécoise des transports to take over some responsibilities that the provincial Ministry of Transport considered unsuited to the normal functions of a government department. Since the middle of the 19th century, public corporations have been responsible for the administration of Canadian harbours, but in 1982, in an attempt at consolidation, the National Harbours Board was established. Nevertheless, there are still some sections, such as the administration and operation of airports, that remain part of a government department, whereas in other countries they are run by Crown corporations.

It is not necessary to analyze this idea in depth to show that an undertaking of the Crown set up as a corporation offers the political authorities a way of carrying out certain functions within the economic sector more successfully than through an administrative unit such as a government department.

If we compare a government department to a corporation, whether public or private, several differences emerge.[21] First, the general purpose of a government department is more complex and less homogeneous because it inevitably represents a compromise between the various social, economic and political missions of the State; it is obvious, for example, that the mandate of the Department of Transport is broader and more complex than that of Air Canada or Via Rail. Even when the mandate of a Crown corporation is ambitious, and sometimes even excessive, the specific and primary function of the corporation is still less complex; the corporation runs a business with certain specific functions, whereas the government department has planning, regulatory, supervisory and control functions of another order: one only has to compare, for example, Petro-Canada or Atomic Energy of Canada to the Department of Energy, Mines and Resources.

Second, government departments do not have the same types of relationships with third parties as Crown corporations do. With its peers, a government department's relationship is mainly consultative. The complexity of a department's tasks requires complex interrelationships since the way a policy is formulated, developed and implemented may affect

the policies of other government departments. On the other hand, a Crown corporation rarely has that kind of problem.

A government department has a relationship of authority with its clients since it must apply pre-established laws, rules and administrative standards; an administrator must be relatively inflexible. A corporation, on the other hand, has commercial relationships with its clients and makes use of negotiations to achieve mutual compromises; the climate of competition requires management to be very flexible.

A government department's relationship to its superiors is very different from that of a Crown corporation with those to whom it is responsible. First, there are many superiors in a government department: central agencies, Cabinet, Treasury Board, the Public Service Commission, the Ministries of Finance, Justice, Public Works, Supply and Services, and so on. These relationships are constant and numerous. In such a context, the performance criteria that will be applied to a government department, or to any other similar administrative unit, pertain to its capacity to develop and implement programs that are in keeping with the political goals of the government in power while respecting the standard requirements of the central agencies.

An incorporated company, on the other hand, is run by a board of directors, which, in principle, is only periodically answerable to the shareholders. The main, if not the only criterion for evaluating performance is the return on capital invested. Of course, a Crown corporation departs from this classic model of the private corporation because of the administrative supervision exercised by Cabinet, Treasury Board and the minister responsible: these controls are, however, different from those exercised by the same authorities over a government department. On the other hand, the criteria for evaluating performance must take into account overall profitability, both economic and social.

If we compare the decision-making process of a government department with that of a corporation, we see that, as far as the choice of strategies is concerned, the government department must operate in a complex participatory structure (including intergovernmental committees, interdepartmental committees, meetings or hearings with interest groups) and must analyze intensively the repercussions of the strategies considered on the various sectors and regions of the country. A government department must incorporate this strategy into the government's economic and financial program. This complex process usually ends with a final decision by the Cabinet or Treasury Board. In the case of a corporation, on the other hand, strategies are usually developed by senior management and adopted by the board of directors; this is a simple and speedy process involving few people. Of course, a public corporation is subject to the minister's directive power; it must submit its development plan, its capital budget and sometimes its operating budget for approval; these constraints make

its position different from that of a private corporation but also very different from that of a government department.

What about the decision-making process used to implement strategies? A government department often depends on decision-making centres that are external to it. In a corporation, on the other hand, once the operational tasks have been distributed to the managers, there is a closer relationship between authority and responsibility for implementation.

As far as budget management is concerned, there are important differences both in drawing up a budget and in the actual commitment of the funds budgeted for expenditure. The budget of an administrative unit is basically a budget of expenses, whereas the budget of a corporation is made up of two parts, income and expenses. The first is, for the most part, adopted outside the unit, whereas it is within the company itself that estimated income is used to defend and justify the capital and operating budgets to the senior management of the corporation; this process obviously takes less time. The rules regarding financial commitments are also more flexible in the case of a corporation. Delegation of authority to different levels of the hierarchy is not impeded by the rules of public law. I know of no case law that has made the rules derived from the maxim *delegatus non potest delegare* applicable to Crown corporations.[22] Exceeding income objectives and spending less than the budget allowed constitute important evaluation criteria for company managers at all levels. This is not at all the case in an administrative unit, where, on the contrary, a person who does not spend all of the money provided in his budget is suspect!

At the administrative level, the constraints imposed by legislation and even collective agreements on public administration are much more restrictive than those imposed upon a corporation, even a public one: creation of jobs, hiring and firing, salary levels, career planning. Time management, which plays a decisive role in a corporation since it influences production costs and ultimately profits, is based on different standards in an administrative unit. Such constraints were considered very important by those who argued that the Post Office should become a Crown corporation.

For all those reasons, incorporation may be attractive if the main objective is efficiency. The consequences, however, must be measured according to the principles of public law. When the law creates a legal entity distinct from the government and charges it with a specific task, and when it gives the responsibility for accomplishing that task to a board of directors, a radical change occurs that will necessarily have repercussions on the nature of the controls exercised by Parliament, by the government and by the minister responsible over the activities engaged in to accomplish the task. Incorporation provides an institutional and legal autonomy that can, of course, be contradicted or impeded by an accumulation of con-

trols that may transform the public corporation into a simple administrative unit; but this is not in accordance with institutional logic and the spirit of public law.

Types of Incorporation

Incorporation by Special Act or Pursuant to General Legislation

There is no principle or rule in public law governing the form of an act incorporating a Crown corporation. Until 1939, Parliament used special acts to create such corporations, but during the Second World War an important network of companies was created by issuing letters patent pursuant to the Companies Act, either under the terms of the general powers conferred upon the government by the War Measures Act or by virtue of the powers conferred upon the Minister of Munitions and Supply by the Department of Munitions and Supply Act.[23]

After 1945, other laws expressly authorized the government or a minister to create Crown corporations without the direct intervention of Parliament. Important corporations were created under this regime, in particular, Atomic Energy of Canada Limited, Eldorado Nuclear, Uranium Canada Ltd., the Canada Lands Company, and so on.

In addition, other Crown corporations were created by order pursuant to the Companies Act, the Canada Corporations Act or the Canada Business Corporations Act but at the initiative of the government or of a minister not expressly authorized by law to do so. This is the case with Canadair, de Havilland Aircraft, the Canada Development Investment Corporation, Via Rail Canada Ltd., CN Marine Industries Ltd., etc. This procedure was noted and criticized by the Lambert Report in 1979[24] and by the Auditor General of Canada in his 1981–82 report.[25]

On a strictly legal level, it would appear that no rule or principle prohibits the government or ministers, in the exercise of their functions, from proceeding with the incorporation of a company under the terms of general corporations legislation. Moreover, the purchase by mutual agreement of a company or its share capital falls under the Crown's unlimited power to make contracts.[26]

Whether it is appropriate, opportune or desirable to have Parliament involved in the creation of a public corporation is another matter. The question must be placed in the context of the spirit of the parliamentary system, as the Lambert Report has done. It is not necessary, even though it may be desirable, for Parliament to pass special legislation when a Crown corporation is created. It is enough if Parliament can become involved at some time or other.

Bill C-153 contains some interesting provisions. This bill, which amends the Financial Administration Act, deals mainly with companies whose

shares are wholly owned by, and whose directors are appointed by, the federal Crown. It provides that, in respect of such Crown corporations, the Governor in Council has the rights and powers of a sole shareholder pursuant to the Canada Business Corporations Act. The bill states that a minister may, subject to the approval of the Governor in Council, procure the incorporation of corporations pursuant to the Canada Business Corporations Act or acquire all of the issued and outstanding shares of any existing corporation. It also provides that no person shall, without the approval of the Governor in Council, incorporate a company or acquire, except by way of security only, shares of a corporation in such a way that the Crown has a proprietary interest. The same approval is required in order to sell or dispose of shares or of all or substantially all the assets of the business or operations of a wholly owned corporation.

Finally, the bill proposes parliamentary control of orders authorizing incorporation pursuant to the Canada Business Corporations Act as well as the acquisition of all the shares of an existing company. Such a posteriori parliamentary control would be desirable; however, I would partially oppose a priori government control, not of the creation of new corporations, but of the acquisition or disposal of the share capital of existing corporations when these operations take place on the stock market.

Bill C-24 of June 29, 1984, goes even further. It requires that an act of Parliament be passed in order to procure the incorporation of a corporation of which any shares would be held by the Crown: to acquire shares of a corporation; to apply for an amendment to the articles of a parent corporation the effect of which would make a material change in its objects; to sell or otherwise dispose of shares; or to procure the dissolution or amalgamation of a parent corporation (s. 100). Such enabling legislation is also required when a parent corporation or a group disposes of all or substantially all its assets. In addition, all of these transactions must be authorized by government order when they involve a parent corporation or a wholly owned subsidiary (s. 101). The government may impose other conditions by order.

Enabling legislation and government authorization are not required in certain circumstances such as the acquisition of shares or assets by way of security, the acquisition or the sale in the ordinary course of a business of providing financial assistance or the reorganization in good faith of a parent corporation or of wholly owned subsidiaries; in addition, the Governor in Council may add other exceptions (s. 102). Any incorporation or acquisition contrary to the law must either be dissolved or an order must be issued directing that the shares or assets so acquired be dissolved, sold or disposed of (s. 103).

The inspiration for these rather stringent provisions comes from the Lambert Report, which recommends that the creation of subsidiaries be approved in the constituent act of the parent company and that the creation or acquisition of such subsidiaries be approved by government order.

Although it may be standard practice for parent companies to be authorized by their constituent act or letters patent to set up or acquire subsidiaries, it does not seem necessary for each of these operations to be approved by official order, since the corporations must, in any case, submit a corporate development plan for approval. Nor is there any justification for specific parliamentary control over the creation of subsidiaries; if Parliament is concerned about them, it can proceed through the ordinary channels. The creation or acquisition of subsidiaries is part of the development of a Crown corporation, as it is with any corporation. Once the development plan is approved, the creation or acquisition of subsidiaries does not really lend itself to a priori control, which may be inefficient and more expensive; the mechanisms and methods of corporate law should be allowed free reign. These issues will be discussed further below.

However a corporation is established, its mandate must be clearly defined. There have been many requests that the "mandate provide a clear definition of the task, purposes, objectives and powers devolved upon the corporation."[27] Otherwise it is impossible to exercise adequate a posteriori control and to formulate criteria for performance evaluation.

In addition, such particulars allow us to judge where the mandate has been exceeded. For example, Bill C-24 contains a rather interesting provision prohibiting a parent corporation and its wholly owned subsidiaries from "carrying on any business or activity that is not consistent with the objects or purposes for which the parent Crown corporation is incorporated, or the restrictions on the business or activities that it may carry on, as set out in its charter" (s. 104).

Incorporation With or Without Share Capital

Traditionally, public companies were corporations without share capital created by virtue of a special act and governed by this act as well as by ordinary law; in Quebec, these were corporations within the meaning of the Civil Code. It was during the Second World War that the federal government began to set up companies incorporated under letters patent pursuant to the Companies Act. This legal form will continue to be used because of its suitability for companies operating in the industrial and commercial sectors.

There are three basic differences between these two corporate forms. First, incorporation without share capital requires a special act, which means that Parliament sanctions the creation of the company and its mandate; on the other hand, incorporation with share capital is usually accomplished by letters patent issued by the government. Second, a traditional constituent act sets up, between the owner and the company, a system of legal relationships that differs considerably from that which exists between the shareholders and the company. Third, the way in which the company is financed is very different depending on the form used.

It is not easy to explain why the state and the politicians prefer a share capital structure for Crown corporations operating in the industrial, commercial or financial sectors. It seems that the main reason is the desire to give these corporations more autonomy and hence a status almost identical to that of private companies operating in the same sectors. It is an organizational and management style that has proved itself and which the authorities would like public corporations to adopt. There is also a desire to show that the output of such companies can be assessed according to comparable criteria.

On several occasions in recent years, government spokesmen have said, particularly in Quebec, that the structure of Crown corporations should be modernized in conformity with the Companies Act. Speaking of Loto-Québec, in 1978, Mr. Parizeau suggested "establishing a corporation that would operate commercially according to well-known rules" (translation).[28] In 1980, Mr. Bérubé argued that the "Companies Act is really based on common sense"; that is why the government is amending legislation regarding Crown corporations, "to place them in a mould almost identical to the Companies Act" (translation).[29] In 1981, the government amended the Hydro-Québec statute, according to Mr. Duhaime, "so that its capital structure will be the same as that of any large North American corporation. . . . It will be easier to compare the financial statements of corporations. . . . Hydro becomes, in a sense, normal in comparison to similar corporations" (translation).[30]

Establishing a Corporation There is a fundamental legal difference between the two types of incorporation. For companies without share capital, the constituent act must be enacted by Parliament and an act of Parliament is required to alter its structure, its mandate or its powers; for those with share capital, the issuing of letters patent or the registration of articles under the Canada Business Corporations Act is a much more rapid and flexible process — the mandate of the corporation can be amended quickly and informally.

A mixed formula has usually been adopted in the case of share capital parent corporations: the enactment of a special act creating a share capital corporation, which then falls partly under the Canada Business Corporations Act or the Canada Corporations Act. Bill C-24 proposes that the Canada Corporations Act should not apply to parent Crown corporations (s. 113).

Legal definition of corporate relationships In the case of traditional corporations without share capital, the constituent act alone establishes the position of relationships between the corporation and the state, which means particularly, the government. In the case of share capital corporations, the situation varies depending upon the existence of a constituent act. In principle, under the Canada Corporations Act or the Canada Business Corporations Act, the government is a shareholder, and identical

relations to those found in private corporate law are established between it and the corporation. However, if there is a constituent act, it often derogates from corporate law: the role of a shareholders' meeting is often changed and replaced by controls expressly given to Cabinet, Treasury Board or the minister responsible.

In studying control mechanisms, we will see that a reduction of controls would favour a more standard application of corporate law, which might increase the efficiency of these corporations.

The Structure of Financing The formation of a corporation with share capital or joint stock clarifies the public financing of the enterprise by rationalizing it.

There are many varied means of financing corporations without share capital. First, an act may provide for a capital endowment or credit or working capital, and it determines the amount.[31] Second, an act may provide for the payment, for a certain period, of "advances", the amounts of which are fixed annually.[32] Third, the law may authorize the government or the minister of finance to make discretionary payments from the consolidated revenue fund.[33] Fourth, the act may provide for the payment of advances or loans at the discretion of the minister of finance or of the government but may require that the government determine interest rates, deadlines and other conditions.[34] Fifth, the act may state that the government may authorize the finance minister to advance to the corporation any amount deemed necessary for its operation while authorizing the government to guarantee the payment in principal and interest of the loans of the corporation.[35] A sixth formula would be the payment of annual grants authorized by the act for certain purposes.[36]

Share capital corporations are created by a special act of Parliament, and Parliament votes them initial capital and expressly authorizes the government or the department to subscribe for shares; the timing of share subscriptions and of payments is fixed by the act. This formula certainly conforms more closely to the principles of our constitutional law than the one by which Parliament gives the government the discretionary power to pay an advance from the consolidated revenue fund.

From the point of view of public finance law, a loan or an advance is credited to the government at cost or at its nominal value except if it comes to be considered a bad debt. Similarly, shares are credited to the state at par value. One might ask, however, whether they properly reflect the accurate value of state assets. If sufficient care is taken, it is probably easier to evaluate shares than other types of assets. Thus, in his 1982 report, the Auditor General recommended that this system be put into practice in order to represent the value of the state's assets more accurately.

Some have argued that, unlike the situation in the private sector, both the determination of authorized capital and the value of shares are fictitious. This criticism may be justified when companies like the Société des alcools

du Québec, Loto-Québec or Hydro-Québec become share capital corporations;[37] however, the initial capitalization is significant[38] and so is the timing of the share subscription and payments.

The corporate share capital structure offers another seldom-used advantage: it allows shares to be transferred to third parties by bringing employees into the capitalization of public corporations. A public capital company may be transformed into a semi-public corporation, an experiment that did not meet with great success during the 1960s as, for example, with the Société générale de financement québécoise (SGF) in Quebec; it has however met with some success during the last few years as a formula for the participation of public and private capital. The Canada Development Corporation and Telesat Canada are interesting illustrations of this phenomenon.

An important question deals with the principles of our public law: can the government, without express legislative authorization, transfer joint stock shares of a public corporation? In the case of certain corporations, for example Air Canada, Petro-Canada, the Export Development Corporation and the Canada Development Investment Corporation, the legislation expressly states that the shares are not transferable. In other cases, it seems to me that corporate law should apply; the shares are available and can be sold.

We should also consider whether these shares, which belong to the Crown and are part of the public domain, can be transferred without parliamentary authorization. The inalienability of public property is not absolute and should not be applied to the shares of these companies. Moreover, at the federal level, section 52 of the Financial Administration Act states that no transfer of public property shall be made to any person except on the direction of the Governor in Council or in accordance with regulations.

It should be mentioned in closing that though the superiority of share capital financing pursuant to a Crown corporation's constituent act may be obvious, it has not been recognized by the legislation, especially federal legislation: many constituent acts call for different types of financing, including the payment of advances or loans at the discretion of the government and the subscription of share capital. These methods appear in various acts including those of Air Canada, the Export Development Corporation and Petro-Canada. Finally, these Crown corporations have a panoply of methods of financing which gives them a considerable advantage: subscription of shares, loans, guaranteed loans, and so on.

The Extent to Which Corporate Law Applies

At the federal level, the Canada Business Corporations Act or Part IV of the Canada Corporations Act, and in Quebec, Part II of the Companies Act apply to companies incorporated as joint stock or share capital companies. In Quebec, there are two exceptions pursuant to Part I of the Companies Act: SIDBEC and the Société d'énergie de la Baie James.

We must not forget that corporate legislation is wholly applicable to many parent companies that do not have constituent acts as well as to corporations in which the majority of the share capital belongs either directly to the government or to a parent company. As for parent companies that do have a constituent act, many provisions of the Companies Act or the Canada Business Corporations Act are either expressly excluded or very difficult to apply.

Provisions Expressly Excluded In Quebec, constituent acts contain a list of inapplicable provisions, which deal in particular with the qualifications of directors, the structure of share capital, the calls on shares and the declaration of dividends.

At the federal level, the situation is more complex and we must refer to each individual constituent act. For example, the Petro-Canada Act states that:

> 27. The following provisions of Part IV of the *Canada Corporations Act* are not incorporated with this Act, and this Act shall be construed accordingly, namely: sections 160 to 161, sections 164 to 188, sections 190 to 197, sections 201 and 202, sections 206 to 211 and sections 213 and 214.

The Air Canada Act, before recent amendments pursuant to Bill C-24, provided that:

> 21. The provisions of the *Canada Corporations Act* do not apply to this Act.
> 22. The definitions 'affairs', 'body corporate', 'debt obligation', 'security' and 'security interest' in subsection 2(1), sections 17, 23, 40, 42 except paragraphs 2(a), (c) and (e) and subparagraphs (2)(d)(ii) thereof, sections 46, 111, 112, 115, 164, 166 and 250 and subsections 2(2) to (5), 16(1), 20(1) and (2), 21(1), 37(9) and (10), 109(9), 117(1), 118(1) to (3), 119(1), (3), (4), (5) and (7) and 163(2) to (4) of the *Canada Business Corporations Act* apply, with such modifications as the circumstances require, to the Corporation.

The new Canada Development Investment Corporation Bill provides:

> Except where otherwise provided, the *Canada Business Corporations Act* does not apply hereto (s. 9 — translation).

However, further on it provides that:

> With respect to the Corporation, the Governor in Council has the rights and powers of a sole shareholder of a corporation pursuant to the *Canada Business Corporations Act*; when the Governor in Council makes a declaration pursuant to subsection 140(2.1) of this Act, the chairman shall take the necessary measures to give effect thereto. (translation)

Finally, Telesat Canada's constituent act is even more detailed in this regard:

> 29. Part IV of the *Canada Corporations Act* does not apply to the company. 1968–69, c. 51, s. 29.

30. (1) Where a provision of the *Canada Corporations Act* that applies in respect of the company makes reference to letters patent, the reference shall be construed in relation to the company as a reference to this Act, and if any such provision makes reference to supplementary letters patent, the reference shall be construed in relation to the company as a reference to letters patent issued pursuant to section 33 of this Act.

(2) Subject to any express provision of this Act with respect to the same matter, the following provisions of the *Canada Corporations Act* apply to the company with such modifications as circumstances require, namely:

(a) subsections 13(9) to (16);
(b) section 17 and sections 21 to 24;
(c) subsections 25(2) and (3) and sections 26 and 27;
(d) sections 34, 36 and 37;
(e) sections 39, 42 and 43 to the extent provided in subsection 18(1) and section 21 of this Act;
(f) sections 48 to 50;
(g) sections 61 to 63 except that the reference to sections 52 to 60 in subsection 62(4) shall be deemed to be a reference to letters patent issued pursuant to section 33 of this Act;
(h) sections 65 and 66 and subsection 67(4);
(i) sections 68 to 73;
(j) sections 74 to 84 except that an attempt or offer by or on behalf of the company to dispose of, or a solicitation of an offer to subscribe or apply for common shares of the company or any interest therein, to the extent that it is directed to Her Majesty in right of Canada or one or more approved telecommunications common carriers, shall be deemed not to be an "offer to the public" with the meaning of paragraph 74(a);
(k) section 85;
(l) subsection 86(3) and (4);
(m) subsection 88(4), subsection 90(2), section 91, section 92 except paragraphs (c) and (d) and section 93;
(n) sections 95 to 97 and section 99;
(o) section 100 to 100.6;
(p) sections 102 and 103 and sections 105 to 108.9;
(q) sections 109 to 132 and section 133 except subsections (9) to (11.1) thereof;
(r) sections 138 to 143;
(s) sections 144 to 147 and section 149; and
(t) subsection 151(3), 1968-69, c. 51, s. 30; 1970 (1st suppl.), c. 10, s. 35.

Bill C-24 of June 29, 1984 made substantial amendments regarding the applicability of the Canada Business Corporations Act to parent Crown corporations. Thus, section 261 of the Act, dealing with surrender of the corporation's charter, does not apply to parent corporations. In addition, the Act amends the constituent acts of several corporations on this point, for example, that of Air Canada.

Provisions Difficult to Apply Several provisions of general legislation with respect to companies appear to be difficult to apply to share capital Crown corporations: for example, those dealing with the forfeiture or sur-

render of the charter and those dealing with the modification of the share capital structure or a change in the number of directors. We must then see whether the constituent act of the company makes the application of these provisions plausible. If the corporation has no constituent act or if the act does not pose any obstacle, we must then consider whether what is legally possible can be accomplished politically.

Designation as Crown Agent or Government Agent

Identification

In British and Canadian public law, the Crown in its executive capacity, that is, the government, has traditionally always benefited from prerogatives and immunities by virtue of common law and acts of Parliament. Toward the end of the nineteenth century and especially in the twentieth century, Parliament has expressly designated as Crown agents or government agents, certain public corporations that are legally autonomous but subject to government control; the aim was to grant these agents certain government prerogatives and immunities. The courts of law deemed it appropriate to extend this capacity to institutions exercising a function similar to that of the government or government agents and subject to sufficient legal control.[39]

A good many Crown corporations, even those of a purely industrial character, are thus designated as government agents. At the federal level, a large majority are so designated, either by virtue of their constituent acts or by virtue of two general statutes, the Financial Administration Act and the Government Companies Operation Act. In Quebec, almost half the parent companies are so designated, and the designation is conferred only by the constituent act. Subsidiaries do not normally enjoy such a designation.

Although the act is silent, the case law has defined two criteria to identify this characteristic: function and control. The first one is almost obsolete because it requires that the judge make a subjective evaluation of the nature of the functions of an institution that acts as an instrument of state intervention in the economy. The second criterion supposes, on the part of the judge, a thorough analysis of all of the elements of control exercised by the government on the agency to determine if the degree of control is sufficient.

Bill C-24 contains the following definition of agent corporation: "A Crown corporation that is expressly declared by or pursuant to any other Act of Parliament to be an agent of the Crown (s.95)." Henceforth, this status will have to be conferred by an act other than the Financial Administration Act. And perhaps the expression "expressly declared" excludes the possibility of a jurisprudential definition by virtue of common law. In fact, it would seem that a Crown corporation subject to the present

act could no longer be designated by the courts as an agent of the Crown because of this very clear statement in the act.

Consequences

The legal consequences of being designated a Crown agent are enormous. Traditionally, it conferred five types of immunity and prerogative, but several of these have been considerably diminished either by statute or by jurisprudence.

The first immunity, of which there remain only traces, concerns civil and criminal immunity. Crown agents are subject to the same civil responsibility as private companies, and since a 1983 Supreme Court decision the situation is almost the same as regards criminal responsibility. In order to invoke this ancient immunity, which was repealed in 1959, a violation of criminal law provisions must be absolutely necessary to achieve the objectives of the corporation.

The second immunity concerns immunity from seizure or prescription of property that is part of the public domain. It is generally excluded from constituent acts.

The third immunity has been sanctioned by s. 125 of the Constitution Act, 1867: it is an immunity from taxation by virtue of which any Crown agent is not liable to taxation.

The fourth immunity stems from an ancient Crown prerogative set out in s. 16 of the federal Interpretation Act and in s. 42 of the equivalent provincial act: it means that no ordinary act is binding on the Crown or the government or affects its rights unless expressly stated therein.

The fifth category contains various prerogatives or privileges set out in different acts or flowing from the common law that may occasionally benefit Crown agents.

Immunities in Matters of Civil and Criminal Responsibility

These immunities are based on the ancient maxim that "the King can do no wrong," which can be applied to matters both civil and criminal. These immunities are still in force for the Crown and its agents and are excluded only if expressly mentioned by Parliament or the legislature.[40]

In civil matters in Quebec, whether it is a question of contractual or criminal responsibility, the Code of Civil Procedure has abolished all immunity. Section 94(a) also provides that: "No claim which can be exercised against a Crown agency or a corporation which the law declares to be an agent of the Crown may be exercised against the Crown."

The situation is not as clear at the federal level. Section 3 of the 1953 Crown Liability Act states that the Crown is liable "in tort" for any damage caused by its agents or in respect of a breach of duty attaching

to the ownership, occupation, possession or control of property. The term agent or servant applies, according to this act, both to the servants of the Crown and to the corporations designed as agents of the Crown. However, the Act adds that "Proceedings . . . may be taken . . . in the case of an agency of the Crown against which proceedings are by Act of Parliament authorized to be taken in the name of that agency."[41] Vicarious liability actions may be brought either against the Crown itself in federal court or against an agent of the Crown in the ordinary courts of law. However, the 1969 Supreme Court decision in *National Harbours Board v. Langelier* seems to say that when the damage is caused by the Crown or its employees, the proceedings are against the corporation itself.[42]

In contractual matters, whether the Crown corporation has contracted in its own name or in the name of the Crown, the proceedings may be brought against the corporation, against the Crown itself, or against both.[43] However, many constituent acts of public corporations state that proceedings may be brought against corporations only.[44] Can it be argued that Crown corporations should be entirely bound by the ordinary laws of contractual and criminal liability and sued before any competent court, in other words, the provincial courts?

The question of the immunity of Crown corporations in matters of penal or criminal responsibility was again dealt with at length by the Supreme Court in a 1982 decision. In 1959, in the case of *Canadian Broadcasting Corporation v. A.G. Ontario*, the Supreme Court had held that the immunity granted by the common law was so fundamental that it would take a very clear legislative provision to eliminate it:

> To say that it intends and has effect to include the Crown as an ordinary subject of the prohibitory or the penal provisions of the Code is repugnant to the principle of immunity in both aspects.
>
> If such a fundamental change had been intended it would not have been affected by a clause of general definition. There is ample matter for legitimate application to Her Majesty, the obvious one being that of a "person" who is the victim of criminality, not its perpetrator: in such and other instances it is used in the description of a factual situation. The definition is to be read distributively and wherever a person so designated can properly be brought within the substantive provisions, that is, in the light of their intendment, of the underlying basic ideas and assumptions of the common law, two of which are that the King can do no wrong and that he cannot be impleaded, and within the punishment prescribed, then that "person" is intended to be designated as one against whom the prohibition is directed and on whom the penalty can be imposed. The application of the word to corporations, societies, companies, and the other legal entities enumerated must clearly be made on those considerations.[45]

In 1982, the Supreme Court refused to make this immunity absolute. Referring to the *National Harbours Board v. Langelier* decision of 1969, Estey J., speaking for the majority, said:

> Borrowing the words of Martland J. in *National Harbours Board*, supra, (at p. 91 D.L.R.): "it is only when the (corporation) is lawfully executing the powers entrusted to it by the Act that it is deemed to be the Crown agent." (p. 72) When so acting and thereby enjoying the status of Crown agent the immunities of the Crown flow through to the agent for its benefit. Where, however, the corporation is not acting "for all purposes of this Act" or with reference to "its powers under this Act" the status and the benefits of Crown agency disappear.[46]

It therefore follows, according to the Court, that immunity does not necessarily result from Crown agent status "in all circumstances." There are three categories of situations. First, "the law reveals no reason why Her Majesty as the fountainhead of justice should not invoke the powers of the criminal courts to enforce a statute which expressly makes Her Majesty's agents subject to its terms."[47] This means that if a Crown corporation is expressly bound by a particular statute, it can be sued in the criminal courts under that law.

Second, immunity will come into play when we are faced with behaviour or an activity expressly authorized by statute; then, as the Ontario Court of Appeal decided in *R. v. Stadiotto*,[48] we must ask whether violation of the Criminal Code or other statute is made necessary to accomplish an act expressly authorized by the law. Thus, it will not be possible to excuse a Crown corporation for a violation of the Highway Code or another statute unless it is established that the action committed was expressly authorized by statute and required that the other statute be violated.

Third, regarding activity or behaviour not imposed or expressly authorized by statute, immunity will not come into play if such actions or behaviour are "inconsistent with the purpose of the Act." Referring to the CBC in relation to the Broadcasting Act, the Court concludes that:

> It is inconceivable that Parliament, by adopting the Broadcasting Act and by authorizing the regulations thereunder including those cited above, would have intended to establish a regime whereby one class of broadcasters is made subject to the general law of the land including the criminal law, whereas the other class of broadcasters is not. Such a result is rendered the more indefensible by the concluding paragraph in s. 3(c) of the Broadcasting Act whereby all persons licensed to carry on broadcasting in Canada are "subject . . . to generally applicable statutes and regulations." This surely must include the Criminal Code of Canada unless there is some other express exclusionary provision in the Code or in the Broadcasting Act or other enactment or Parliament. We have been referred to no such exclusion.[49]

In my opinion the conferring of immunity upon Crown agents pursuant to the maxim "the King can do no wrong" makes no sense when applied to Crown corporations. Surely it is an aberration for the CBC to claim, in this day and age, that it is above the provisions of the Criminal Code in matters of obscenity simply because it has Crown agent status. Fortunately, the Supreme Court has reduced this immunity to acceptable proportions. But the issue remains and could cause further problems.

Immunity with Respect to Assets and Means of Implementation

At common law, Crown property enjoys the privileges of immunity from seizure and prescription. In Quebec the Civil Code provides the same privileges. As an agent of the Crown, a Crown corporation benefits from such privileges.

A Crown corporation can be considered as the owner of its property or it can simply be the owner, custodian or trustee of property belonging directly to the Crown; if it has Crown agent status, it enjoys the privileges applicable to the public domain of the state. The Quebec statutes usually include the following phrase: "The property of the Corporation shall form part of the public domain."[50] At the federal level, section 108 of Bill C-24 is even clearer: it provides that the property held by an agent corporation is the property of the Crown, whether title thereto is vested in the name of the corporation or of the Crown.

Almost all the constituent acts of Crown corporations derogate, at least in part, from these immunities by stating that "the performance of the obligations of the corporation may be levied on such property"[51] which would otherwise be immune from seizure. At the federal level, the statutes are not as precise and mention simply that "other legal proceedings . . . may be brought or taken by or against the Board (or Corporation) in the name of the Board in any Court that would have jurisdiction if the Board were not an agent of Her Majesty."[52] This provision is probably not sufficient to permit execution against the property of the Crown agent being sued. However, this immunity does not appear to have caused any problems for the creditors of Crown corporations.

Immunity from Taxation

Immunity from taxation is a government privilege that is even more important because of the federal nature of Canada and because of our administrative tradition that allows municipal authorities a share of the tax base.

The royal prerogative whereby the Crown is exempt from taxation on its properties, its assets, its revenue and its activities has often been defined through legislation. The most important of these provisions is section 125 of the Constitution Act, 1867, which states that "no Lands or Property belonging to Canada or any Province shall be liable to Taxation." This provision does not, however, limit the Crown's immunity from taxation at common law, which applies not only to property taxes but to any other form of taxation such as sales tax, business tax and income tax, subject to certain limitations imposed by the case law.

The scope of immunity from taxation has been defined in the case law. The tax in question must be a tax in the strict sense rather than a tax on

the selling price of a public service or a fee for a public service. For example, the so-called municipal water tax was not considered a tax in the strict sense;[53] on the other hand, the tax on snow removal is a tax in the strict sense.[54] The case law has identified two criteria for this purpose: the voluntary nature of payment and the relationship between the price and the value of the service rendered. According to the latter criterion, all that is needed is that there be no direct equation of the value of the service rendered and the amount of the tax.

To be eligible for immunity, the tax must apply to the property or revenue of the Crown: and for it not to be illusory, the immunity must apply not only to taxes on property but also to taxes payable by the Crown with respect to its property or taxes on an operation relating to the property of the Crown.[55]

The case law states that the fiscal immunity provided for, particularly in section 125 of the Constitution, cannot be invoked by the provincial Crown to limit "the operation of Dominion law in the exercise of the authority conferred by s. 91 (B.N.A. Act)";[56] the provinces must, therefore, pay import duties or they would be infringing upon federal jurisdiction over the regulation of international trade. The Supreme Court recently defined the scope of this immunity in *Reference Re Proposed Tax on Exported Natural Gas*.[57]

To appreciate the exact scope of section 125 we must, according to a 1982 Supreme Court decision, remember what Clément wrote in 1916:

> It was not intended to affect the general rule as to the exemption of Crown property from taxation as that rule is to be applied, for example, in England or in a colony under one legislature only. It was inserted by way of abundant caution to prevent the Dominion from levying taxes for federal purposes upon property held by the Crown for provincial purposes, and *vice versa*.[58]

Section 125 was, therefore, intended to prevent one level of government from taxing the "lands and property" of the other level.[59] We must remember that income tax did not exist in 1867, and that import duties were the federal government's main source of revenue (80 percent of the budget), and that the provinces got most of their money from revenue from public lands — the provinces' powers of direct taxation and licensing were not very extensive at the time.[60]

Section 125, regarding the federal government's taxation power in section 91(3), took on a particular meaning:

> . . . it was necessary for the survival of the provinces and of the Canadian federalism that this vital source of provincial revenue be protected from erosion through taxation. Section 125 thus gives legislative recognition to that constitutional value.[61]

It follows that section 125 must derogate from the express powers of taxation in sections 91(3) and 92(2):

> Section 125 raised to the rank of constitutional guarantee the immunity of provincial property from taxation. Section 125 is an exception to the general constitutional competence of the federal Parliament in the matter of taxation based on s. 91(3) and in this manner the section renders inapplicable to the property of the provinces federal fiscal legislation enacted pursuant to section 91(3).[62]

However, according to the decisions of 1924 and 1982, section 125 cannot be invoked by provincial Crowns to restrict "the operation of Dominion laws in the exercise of the authority conferred by section 91"[63] that is, "the exercise of the other heads of power found in section 91."[64]

In its 1924 decision concerning the importing of alcoholic beverages by a Crown corporation in British Columbia, the Privy Council had held that the Customs Act fell within the legislative competence of Parliament over the "Regulation of Trade and Commerce" pursuant to section 91(2) of the Constitution Act, 1867. In 1982, the Supreme Court held that, as in any other constitutional matter, the "pith and substance" of the legislation must be taken into account:

> If the primary purpose is the raising of revenue for general federal purposes then the legislation falls under s. 91(3) and the limitation in s. 125 is engaged. If on the other hand, the federal government imposes a levy primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme, such as the "adjustment levies" considered in *Reference re Agricultural Products Marketing Act*, etc. (1978), 84 D.L.R. (3d) 257, (1978) 2 S.C.R. 1198, 19 N.R. 361, or the unemployment insurance premiums in *A.G. Can. v. A.G. Ont. et al.*; *Reference re Employment and Social Insurance Act, 1935*, (1937) 1 D.L.R. 684, (1937) A.C. 355, (1937) 1 W.W.R. 312, then the levy is not in pith and substance "taxation" and s. 125 does not apply.[65]

In the 1982 decision, the law being challenged was Bill C-57 (1980), which levied a tax on the export of natural gas. It was decided that the purpose of the Bill was taxation and not regulation:

> The text of Bill C-57 contains no language to indicate that the tax is imposed as a regulatory device or to reduce or eliminate the export of natural gas. The tax is imposed in a uniform manner. It imposes a tax on all gas produced whether consumed outside or inside Alberta. It applies equally to distributors, local or national, to exporters, to consumers. It is recoverable from anyone who uses or sells natural gas.[66]

The purpose of federal laws such as the Petroleum Administration Act and the National Energy Board Act is to regulate the economy. But this is not the case with Bill C-57:

> The proposed tax in this case, when viewed in light of other legislation touching the natural gas industry, has no such regulatory effect on behaviour. By its very comprehensiveness, the tax belies any purpose of modifying or directing the allocation of gas to particular markets. Nor does the tax purport to regulate who distributes gas, how the distribution may occur, or where the transactions may occur.[67]

The 1982 Supreme Court decision has been seen as a clarification of the scope of the immunity from taxation conferred by section 125 of the Constitution. However, the distinction proposed by the Court between a statute that is "in pith and substance" taxation, and a statute intended for economic regulation may be somewhat artificial and difficult to apply. One writer has called the distinction non-functional.[68] In addition, it ignores a contemporary reality: taxation has become a means of regulating the economy as well as a means of collecting public monies.

Some say that the case law has distorted the real meaning of s. 125 of the Constitution. This section has two elements: for immunity to be applicable, there must, on the one hand, be a "tax" and on the other hand, the tax must apply to Crown property and be imposed against the Crown as owner.

> It is submitted that the most reasonable interpretation of section 125 is that it provides reciprocal immunity with regard to a property tax on lands or property of Canada or a province or a personal tax on Canada or a province with respect to its ownership of lands or property. The immunity does not extend to a transaction tax such as a sales tax or to an income tax. There seems to be no reason to confine the meaning of property and thus it should include all types of property, whether movable or immovable, corporeal or incorporeal.[69]

Laforest does not share this point of view.

> Any federal tax imposed directly against the provinces, or any provincial tax imposed against the federal government is *ultra vires* since the Consolidated Revenue Funds, or at least the money in them, are property.[70]

That is the interpretation that prevails at present and which is surely the only acceptable one; otherwise, section 125 would restrict the immunity enjoyed by the Crown, federal or provincial, at common law. Section 125 has not created an immunity from taxation that the Crown did not enjoy before 1867. Immunity from taxation flows from the royal prerogative. According to the text-writers, it means that the property and revenue of the Crown cannot be taxed.[71]

Since immunity is a prerogative of common law origin, it can be abolished or limited by Parliament or by the appropriate legislature. The effect of section 125 of the Constitution Act, 1867 has been to prevent Parliament from abolishing or limiting this prerogative in the case of provincial Crowns and to prevent the provincial legislatures from affecting the federal Crown's immunity. As Clement suggests, this section may not have been necessary. But the Fathers of Confederation decided it was a necessary precaution because of the principle of the indivisibility of the Crown, which was absolutely indisputable at the time.

The situation of public corporations with respect to taxation has become, on the whole, somewhat complex because the federal Parliament has reduced the tax exemptions of a good many federal corporations. Moreover, it has granted tax exemptions to corporations that are not agents of the

Crown. Provincial legislatures have done the same with respect to provincial Crown corporations. Finally, since 1977, the tax situation of Crown corporations has been regulated mostly through federal-provincial fiscal arrangements.

With respect to federal taxation, there is at least one piece of tax legislation that applies to everyone: the Customs Act. The Income Tax Act provides that no income tax shall be paid by:

> (d) municipal or provincial corporations — a corporation, commission or association not less than 90% of the shares or capital of which was owned by Her Majesty in right of Canada or a province or by a Canadian municipality, or a wholly-owned corporation subsidiary to such a corporation, commission or association but this paragraph does not apply
>
> (i) to such corporation, commission or association if a person other than Her Majesty in right of Canada or a province or a Canadian municipality had, during the period, a right under a contract, in equity or otherwise either immediately or in the future and either absolutely or contingently, to, or to acquire, shares or capital of that corporation, commission or association, and
>
> (ii) to such wholly-owned subsidiary corporation if a person other than Her Majesty in right of Canada or a province or a Canadian municipality had, during the period, a right under a contract, in equity or otherwise either immediately or in the future and either absolutely or contingently, to, or to acquire, shares or capital of that wholly-owned subsidiary corporation or of the corporation, commission or association of which it is a wholly-owned subsidiary corporation (s. 149(1)(d)).

Under the terms of Interpretation Bulletin IT-347 of September 20, 1976, the minister extends the exemption to subsidiaries of wholly owned subsidiaries.

Section 27 of the Income Tax Act imposes a tax on the income of certain Crown corporations as specified by regulation (amended by Bill C-24 on June 29, 1984).

As for provincial taxation, the Quebec Taxation Act exempts from income tax any corporation of which the shares, capital or property are at least 90 percent owned by Her Majesty in right of Quebec or in right of Canada.[72] However, section 192 of the Act provides that "a corporation carrying on a business as an agent of Her Majesty or of the Government" must pay income tax "unless otherwise provided by the regulations."[73] Section 192R1 of the Income Tax Regulations states:

> 192R1. For the purposes of the first paragraph of section 192 of the Act, section 985 of the said Act applies to every Quebec or Canada Crown corporation with the exception of the following corporations:
>
> (a) St. Lawrence Seaway Authority;
> (b) Atlantic Pilotage Authority;
> (c) Great Lakes Pilotage Authority Limited;

(d) Laurentian Pilotage Authority;
(e) Pacific Pilotage Authority;
(f) Air Canada;
(g) Federal Mortgage Exchange Corporation;
(h) National Railways as defined in the Canadian National–Canadian Pacific Act (R.S.C., 1952, c. 39);
(i) Seaway International Bridge Corporation Ltd.;
(j) Eldorado Aviation Limited;
(k) Eldorado Nuclear Limited;
(l) Freshwater Fish Marketing Corporation;
(m) Petro-Canada;
(n) Canada Mortgage and Housing Corporation;
(o) Canada Deposit Insurance Corporation;
(p) Farm Credit Corporation;
(q) Cape Breton Development Corporation;
(r) Northern Transportation Company Limited;
(s) Polysar Corporation Limited;
(t) Export Development Corporation;
(u) Canadian Broadcasting Corporation;
(v) Teleglobe Canada;
(w) Via Rail Canada Inc.[74]

The situation is then in principle the following: all government enterprises pay income tax except those listed in the Regulations and those at least 90 percent owned by the Crown.

Since 1979, the provincial Crown and its agents have been subject to eight tax laws regarding retail sales, tobacco, meals and hospitality, licences, fuel, electronic advertising, races, publicity contests and amusement machines.[75]

Again with regard to provincial taxation, a federal statute, repealed in 1977, subjected 26 federal Crown corporations to tax of general application on retail sales, on gasoline and fuel, and to vehicle registration fees.[76]

Under the terms of the 1977 Federal-Provincial Fiscal Arrangements Act, the federal government may sign reciprocal taxation agreements with each of the provinces. It seems, however, that neither Quebec nor Ontario has signed such an agreement. Nevertheless, section 39 of the Act imposes any provincial tax or fee payable to a non-participating province on 31 federal Crown corporations.[77] In a case where there is a reciprocal taxation agreement between a province and the federal government, other categories of taxes must be paid reciprocally.

The Quebec Taxation Act also imposes a tax on paid up capital. Section 1143 of the Act provides:

> 1143. Every tax exempt corporation under sections 980 to 996 or 998 and 998.1, except a prescribed corporation, or every corporation whose property is deemed to be the property of an *inter vivos* trust contemplated in section 851.25, is exempt from capital tax.
>
> However, any corporation which is exempt under s. 192 from the application of s. 985 is not exempt from such tax.

In addition, any corporation which is a charitable organization under the terms of s. 1 or whose property is deemed to belong to an *inter vivos* trust contemplated in s. 851.25, and which is exempt from the tax pursuant to paragraph 1, must, however, pay tax on the capital of a business which it operates. (Translation).

The Regulations also provide that:

1143R1. For the purposes of the first paragraph of section 1143 of the Act, the prescribed corporations are:

(a) the following Quebec Government corporations:
  i. Hydro-Québec;
  ii. Société des loteries et courses du Québec;
  iii. Raffinerie du sucre du Québec;
  iv. Société des alcools du Québec;
  v. Société de cartographie du Québec;
  vi. Société de développement de la Baie James;
  vii. SIDBEC;
  viii. Société générale de financement du Québec;
  ix. Société nationale de l'amiante;
  x. Société québécoise d'exploration minière;
  xi. Société québécoise d'initiatives agro-alimentaires;
  xii. Société québécoise d'initiatives pétrolières;
  xiii. Société de récupération, d'exploitation et développement forestiers du Québec (REXFOR); and
(b) the wholly owned subsidiaries, within the meaning of section 1 of the Act, of the corporation mentioned in paragraph a.

As regards municipal taxation, there are two systems in Quebec. First, since 1979 any real property administered or managed by an agent corporation of the Crown in right of Quebec must pay municipal and school real estate taxes.[78] The Municipal Taxation Act nevertheless exempts real property belonging to the Corporation d'hébergement du Quebec, the Régie des installations olympiques and the Société de la Place des Arts in Montreal.[79] Some constituent acts of Crown corporations add other exemptions: for example, the power plants and dams of Hydro-Québec.[80]

On the other hand, tax exemptions remain absolute as regards municipal and school real estate taxes in the case of federal corporations; the Municipal Taxation Act says so expressly.[81] However, many special statutes expressly provide that grants "in lieu of taxes" may be made to a municipality by a Crown corporation.[82]

It should be pointed out that the federal Municipal Grants Act, which provides that the minister of finance may pay to any municipality a grant in lieu of property tax, does not apply to "real property under the control, management or administration of the National Railways as defined in chapter 39 of the Revised Statutes of Canada, 1952, or corporation, company, commission, board, or agency established to perform a function or duty on behalf of the government of Canada. . . ."[83]

The Quebec Municipal Taxation Act provides that if a property, which is non-taxable because it belongs to the federal Crown or its agents or the provincial Crown excluding its agents, is occupied by a person other than those contemplated in section 204, then the property becomes taxable in the hands of the lessee or occupant. The Act adds that in this case, the word "person" includes the "Crown." This last provision is not very clear.

The question of municipal taxation of the property of Crown corporations has long been a subject of controversy. Even today, there is discontent in certain municipalities that feel that they are not getting their fair share in return for the services they offer to federal Crown corporations; for example, the City of Montreal had disagreements with the St. Lawrence Seaway Authority from 1967 to 1975; the City claimed that it was owed $417,770 "in lieu of taxes" for the Lachine Canal facilities. More recently, in the National Assembly the Quebec minister of municipal affairs compared the tax situation of the Palais des Congrès, a Quebec Crown corporation, to that of the CBC:

> Mr. Léonard: Yes, Mr. Speaker, we have actually researched the question because it had been raised in statements concerning the Palais des Congrès. Actually, the Government of Quebec will pay — in property taxes alone — $2,214,000; if we add business taxes of $1,613,000 and utility taxes of $585,000 on the Palais des Congrès, the total is $4,400,000 per year in taxes. As for the CBC, it has one of the largest buildings in Montreal evaluated by the CUM at $106,000,000. It should bring in $3,919,000 in property taxes alone, $2,856,000 in business taxes, and $1,035,000 in utility taxes, for a total of $7,811,000. However, the federal government pays $400,00 per year in taxes . . .
>
> Some hon. Members: Oh! Oh!
>
> Mr. Léonard: . . . plus about $40,000 per year in water tax pursuant to an agreement signed on April 5, 1963, between the City of Montreal and the federal government. At the time, there was talk of $180,000 per year in taxes for 1967 to 1979 and $400,000 for 1979 to 1994. In other words, until 1994, the federal government will pay, for one of the largest buildings on the Island of Montreal, $400,000 in taxes with all the expropriations carried out when the building was built.
>
> Some hon. Members: Shocking![84] (Translation)

In 1979, Bill C-3 with respect to grants to municipalities was tabled before the federal Parliament. This Bill would have instituted a system of grants for Crown corporations in the context of regulations to be enacted by the Governor in Council. The minister sponsoring the Bill estimated that the Bill would allow an additional $100 million in taxes to be paid by Crown corporations to municipalities.[85] Even if, legally, this is a system of discretionary grants which, in fact, aims at "equality between grants and taxes . . . the rate of tax used in calculating the grants is to be the rate that would be applicable to property of the federal government if it were taxable property."[86]

Bill C-3 did not pass second reading. It was abandoned because of the opposition of the provincial ministers of municipal affairs. The Quebec minister recently explained the position of the Quebec government on this issue:

> I must remind the honorable member that the Canadian mayors and the ministers of Municipal Affairs have opposed Bill C-4 precisely because it did not do justice to the various municipal tax systems in Canada. The dispute involved all the municipalities and the ministers of Municipal Affairs, at the time, in 1979, against Bill C-4. We feel that it was unfair and there are still claims outstanding in this regard. On the other hand, let me point out that we prefer a non-discretionary system for paying taxes because it seems to me that the federal government should pay taxes like everybody else, just as it pays its telephone or electricity bills, because, after all, these are services provided by the municipalities, and not discretionary monetary gifts from Santa Claus without accounting to anyone, with no justification of his actions. I think it is a system which dates back to Adam and Eve, or at least to Jesus Christ's grandfather.[87] (Translation)

One can only agree.

The Privileges of Non-Application of Statutes

An ancient royal prerogative exempted the sovereign, or the Crown, from the ordinary laws of Parliament unless a specific provision was made to the contrary. A consistent body of case law provides a precise definition of the scope of this common law prerogative.

It was first decided that the prerogative applied only to the laws that affected the rights of the Crown; the law in question must affect the rights of the Crown by depriving it of a right vested or by imposing an obligation.[88] In the case of a law of general application that affects only rights *in posse* or simply the right of the Crown, it will apply.[89] Similarly, the Crown can always invoke a law in its favour or take advantage of it without being expressly mentioned, but if it takes advantage of a law, it must submit to the disadvantageous provisions of the same law.[90]

The Privy Council has also decreed in the famous *Bombay* decision that the Crown can be bound by a law "by necessary implication":

> . . . The general principle to be applied in considering whether or not the Crown is bound by general words in a statute is not in doubt. The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein.
>
> . . . But the rule so laid down is subject to at least one exception. The Crown may be bound, as has often been said, "by necessary implication." If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the Legislature that the Crown should be bound, then the result is the same as if the Crown has been expressly named . . . .

. . . If it can be affirmed that, at the time when the statute was passed and received royal sanction, it was apparent from its terms that its beneficient purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound. Their Lordships will add that when the court is asked to draw this inference, it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words.[91]

These rules, which are particularly difficult to apply, define more clearly the prerogative that the federal and provincial interpretation acts have formulated since 1867. Until 1968, section 16 of the federal act read as follows:

No provision or enactment in any Act affects, in any manner whatsoever, the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.[92]

However, in 1968 Parliament restated the provisions as follows:

No enactment is binding on Her Majesty or affects Her Majesty of Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to.[93]

In a 1978 decision the Supreme Court held that the new section 16 strengthened Crown privilege by making it absolute:

In my opinion, the present s. 16, if it is to be considered as referring to the Crown in right of a Province as well as to the Crown in right of Canada, goes farther than the superseded provision to protect the Crown from subjection to legislation in which it is not clearly mentioned. Whereas the section considered in *In re Silver Bros. Ltd.*, *supra* and in *Dominion Building Corporation v. The King*, *supra* spoke only of affecting the rights of the Crown (a point that was taken in respect of the similar Ontario section in the *Dominion Building Corporation* case and which appeared to control the decision there arrived at), the present s. 16 goes beyond "rights" alone and is express that, in addition, "no enactment is binding on Her Majesty or affects Her Majesty. . . ."[94]

Parliament or the legislatures can make any ordinary law applicable to the Crown and its agents. However, the case law states that if a provincial law expressly binds the Crown, or the government, or Her Majesty, such provisions affect only the provincial Crown and its agents.[95] On the other hand, the federal Parliament can, in its area of competence, expressly bind provincial Crowns by mentioning them specifically:

It is, of course, open to the federal Parliament to embrace the provincial Crown in its competent legislation if it chooses to do so: see for example, *Attorney General of British Columbia v. Attorney General of Canada, Attorney General of Quebec v. Nipissing Central Railway*. [96]

Finally, the Supreme Court, in a 1978 judgment, even held that:

> Decisions of the Courts, including decisions of the Privy Council, have, however, treated a general reference to the Crown in provincial legislation and in federal legislation as referring to the Crown indivisible.[97]

The situation created by this privilege of non-application of ordinary laws except where expressly mentioned is extremely complex. There are at present three applicable regimes. For federal legislation, the regime imposed by section 16 of the Interpretation Act is the most inclusive and excludes the pure and simple application of any act, which according to the Supreme Court, amounts to rejecting the rule of "necessary implication." It was by invoking section 16, for example, that the Government of Alberta was able to acquire acquire all the shares of Pacific Western Airlines without seeking the authorization of the Canadian Transport Commission as required by sections 19 and 20 of the Air Carrier Regulations. The Court rejected the argument that

> . . . lay in the assertion that the Aeronautics Act and the Air Carrier Regulations were embracive of all entrants or would-be entrants into the business of commercial air carriers or in the control, or participation in the control, of corporations engaged in such business. This, however, is an argument that is applicable to any piece of general regulatory legislation and proves too much, unless it be taken that where the Crown engages in ordinary commercial activities it is equally subject to the regime of control of those activities. This has not hitherto been the rule followed by the Courts, nor is it supported by the expression of principle as to Crown subjection to legislation found in s. 16 of the Interpretation Act, R.S.C. 1970, c. I-23.[98]

It was also by virtue of section 16 of the federal Interpretation Act that the Caisse de dépôt et de placement du Québec avoided the requirements of section 121 of the Canada Business Corporations Act governing the transactions between insiders.[99] More recently, the Supreme Court of Canada and the Ontario Court of Appeal held that the Combines Investigation Act did not apply to Eldorado Nuclear and Uranium Canada Ltd., both agents of the federal Crown, because no provision of the act expressly mentions them; this was the famous case of the uranium cartel in which, curiously enough, the Attorney General of Canada prosecuted Crown corporations for violation of the Act.[100]

Section 16 of the federal Interpretation Act can be invoked not only by a provincial Crown corporation against a federal act but also by a federal Crown corporation against a provincial act. That is how the federal Freshwater Fish Marketing Corporation, an agent of the federal Crown, avoided the anti-pollution laws of Saskatchewan and of the City of Winnipeg.[101]

As regards provincial laws, in all provinces except British Columbia, provincial Crown corporations enjoy the traditional privilege of non-application of such legislation with the possibility of invoking the rule of "necessary implication." In Quebec, for example, the legislature has made

many important acts such as the Environmental Quality Act, the Act Respecting Occupational Health and Safety, the Labour Code, etc., expressly applicable to the Crown. On the other hand, other no less important acts are silent in this regard.

In 1974, the British Columbia legislature amended the Interpretation Act in order to make any act applicable to the Crown except where otherwise provided.[102] It is the only government in Canada to have recognized the fundamental principle of equality before the law. In any case, this does not affect federal Crown corporations if they are agents of the federal Crown, since they can always invoke section 16 of the federal Interpretation Act.

It would seem that the only coherent way of clarifying this issue would be to place it in the context of the division of legislative powers resulting from Canada's federal nature. The federal Interpretation Act should be amended to make all federal legislation applicable to the federal Crown and its agents, except where otherwise provided; provincial legislation should also be amended as it was in British Columbia.

Interjurisdictional immunities should be justified solely on the basis of legislative jurisdiction and should be based on whatever is necessary for the federal and provincial Crowns, each in their own right, to attain their objectives. For example, based on the federal government's legislative jurisdiction over national defence or the postal service, the federal Crown and its agents could claim non-applicability of any provincial law that would impede their activities or constitute an obstacle to the exercise of their mandate.

Various Immunities and Prerogatives

The Crown enjoys various prerogatives and immunities most of which may, directly or indirectly, also benefit Crown agents. A few examples will suffice to illustrate their purpose.

In legal matters, the Crown has for some time enjoyed certain privileges before the courts, the most important of which are described in section 41 of the Federal Court Act and, in Quebec, in article 308 of the Code of Civil Procedure.[103] At the federal level, the Canada Evidence Act was amended in 1982 in order to establish three methods for limiting disclosure of government information.[104] If it is claimed that disclosure is contrary to the public interest, that claim can be contested in a superior court or in the Federal Court. If the reason for non-disclosure is that it could be harmful to national defence or security, then it is the Chief Justice of the Federal Court who must decide. Finally, if a minister or the clerk of the Privy Council swears in writing that the information constitutes confidential information about the Cabinet or its committees, disclosure is forbidden.

The Bankruptcy Act provides, in section 187, that "the provisions of this Act bind the Crown in right of Canada or a province."[105] This provision, although clear and unambiguous, has nevertheless raised a constitutional problem that Professor Albert Bohémier dealt with in a book published in 1972.[106] He concluded that the federal act does not apply to agents of the provincial Crown when they are pursuing public objectives.[107] On the other hand, this argument does not apply in the case of agencies whose objects are of a private nature. In these cases, the Act could, then, govern the bankruptcy of such agencies. This thesis, interesting in many respects, contradicts the theory of ancillary powers developed in constitutional jurisprudence. It is now agreed that the Act contains many ancillary powers that render provincial legislation inoperative.[108] In fact, it would seem that Mr. Bohémier's analysis has not been supported in either the case law or in legal writing.

The Bankruptcy Act does not seem to have been used against Crown corporations; they have, however, invoked it in their favour.[109] Bill C-17 with respect to bankruptcy, tabled in the House on January 31, 1984, provides in section 9(2) that a bankruptcy procedure cannot be made or a petition filed in respect of the federal or provincial Crown, or their agents or municipal corporations. This provision will no doubt end the jurisprudential uncertainty on this matter.

The Patent Act gives the Crown an important prerogative whereby the Crown and its agents may take possession of any patent, subject to compensation set by the Commissioner. The Supreme Court has held that any agent of the Crown, even of a purely industrial nature, can benefit from this prerogative.[110]

Crown agents enjoy the same privileges as the Crown with respect to preferential payment following legal proceedings against, or the bankruptcy of, a debtor. These privileges are provided for the Civil Code, the Federal Court Act and the Bankruptcy Act.

The Freedom of Information Act (federal) gives certain Crown corporations classified as federal institutions certain non-disclosure privileges with respect to documents containing certain confidential information as well as information the disclosure of which might conceivably be prejudicial to federal-provincial relations, the conduct of international affairs, or defence, etc.[111] In Quebec, the Act respecting Access to Documents held by Public Bodies[112] also gives certain privileges and immunities to agencies of which a majority of the members are appointed by the government or its ministers or whose partnership capital is part of the public domain. By virtue of these two acts, citizens, however, do have recourse to quasi-judicial or judicial remedies.

Controls Imposed on Crown Corporations

In a constitutional system with a parliamentary democracy and ministerial responsibility, Crown corporations are not "states within the state," even

though they have considerable freedom of action and autonomy. The state, or the state community, not only owns national or provincial public corporations but, through its various agents, controls such companies and defines their mandates. The controls may be legal, political, administrative, financial or mixed. It is easier to analyze them by examining the controlling agents: I will, therefore, distinguish between government control, parliamentary control and the Auditor General's control. These three categories of control differ in nature, scope, conditions of implementation and effects.

Parliament and the government exercise political control, whereas the Auditor General has a more precise and more limited role: he checks to see that activities have been carried out properly and efficiently. Both Parliament and the Auditor General possess a posteriori controls, whereas government control is both a priori and a posteriori.

The scope of control depends upon the controller's means of inquiry and the constraints he can employ. From a strictly legal point of view, the three controlling authorities have comparable means, but in practice, the government has a tighter hold. The Auditor General can carry out a thorough investigation but only after the fact. Parliament is in a weaker position because it depends upon information relayed by other controllers.

The conditions for implementing controls vary quite considerably. The government and the Auditor General have different relationships with Crown corporations; the government has a variety of means of control, whereas the Auditor General must stay within the bounds of his act. Parliament plays an even smaller role in the maze of parliamentary committees.

The effects of the various controls are quite different. The effects of parliamentary controls and of the Auditor General's reports do not have the same impact and are felt mostly in the long term; on the other hand, governmental or ministerial supervision is immediate and is felt in the short and medium term.

For the past seven or eight years, Parliament Hill has been the scene of a flurry of control-tightening activity. In Ottawa, accountability has become a byword. On the one hand, the government has been accused of having lost control of the enormous machines that grow with the dynamic rhythm of large corporations or which make enormous holes in the coffers of the state. On the other hand, the Auditor General has taken it upon himself to save parliamentary control from oblivion. Finally, certain particularly vigilant members of Parliament have sounded the alarm. The various stages in this process are as follows: the Auditor General's reports since 1976, the work of the Public Accounts Committee since 1977, the federal government's blue paper in 1977, the *Report of the Royal Commission on Financial Management and Accountability* (Lambert Report) in 1979, Bill C-27 in 1979, Bill C-123 in 1982, Bill C-153 in 1983 and Bill C-24 on June 28, 1984.

This awakening was necessary because Crown corporations are neither private companies nor "states within the state." But beware the pendulum!

Some reform proposals, while well intended, are dangerous because they contradict both the raison d'être of the Crown corporation network and certain objectives inherent in this choice of instrument designed to ensure adequate intervention by the public authority. [113]

Government Control

Crown corporations are legal entities distinct from the government, that is, from the Crown in its executive capacity.[114] However, the government is their primary authority legally and politically. Legally, the government is either the shareholder of a Crown corporation, the owner of its assets or a trustee to whom the law technically allocates certain precise powers of control.

Politically, of course, the act allocates a particular task to the board of directors of a Crown corporation but it is clear that, more often than not, this task is related to a broader government purpose, so that a Crown corporation can really be considered a means of implementing the economic policies of the government. The result is that the concept of the autonomy of a Crown corporation has a specific meaning that must be well understood.

The legislation often describes in very general, even surprisingly ambitious terms, the objects of Crown corporations. In Quebec, for example, the object of the Société générale de financement (SGF) is to "stimulate and promote the formation and development of industrial undertakings . . . so as to broaden the basis of its [i.e., Quebec's] economic structure, accelerate the growth thereof and contribute to full employment" as well as "to induce the people of Quebec to participate in the development of such undertakings by investing a part of their savings therein" (c. S-17, s. 4). The objectives of la Société de récupération et de développement forestiers du Québec (REXFOR) are no less ambitious:

> b) to revalorize, by any appropriate sylvicultural measure, preserve and protect forest and land intended for forest use indicated by the government;
> c) to encourage the establishment and development of the forest industry and new employment. (c. S-12, s. 3)

The objectives of the Société québécoise d'initiatives agro-alimentaires (SOQUIA) are:

> a) to promote the installation, modernization, expansion, development, consolidation or grouping of the industries of the food sector;
> b) to participate or intervene in the production, processing, conditioning and marketing of any product related to the sector of agriculture or food or to commercial fisheries. (c. S-21, s. 3)

SIDBEC's role is:

to pursue the operation of a steel complex, alone or with partners, to ensure, as a profitable enterprise, the consolidation and expansion of its operations, so as to promote the development of steel consuming industrial undertakings in Québec. (c. E-14, s. 9.1)

The objectives of the Société nationale de l'amiante are:

(a) exploration for and the development and exploitation of asbestos deposits, including the marketing of production;
(b) any activity of an industrial, manufacturing or commercial nature directly or indirectly relating to the processing of asbestos fibre;
(c) research and development of new uses or processing methods of asbestos. (c. S-18.2, s. 4)

Hydro-Québec, besides supplying energy,

shall estimate the needs of Quebec in energy and the means of meeting them within the scope of the energy policies that the Lieutenant-Governor in Council may otherwise establish.

The Corporation may implement energy conservation programs; to that end, it may grant technical or financial assistance. (c. H-5, s. 22.1)

In the case of the Caisse de dépôt et de placement, the law says nothing about its purpose, but according to its sponsor, former Premier Jean Lesage, it was not only to ensure an adequate return on the funds it managed but also to be a financial pool for the economic growth of Quebec.[115] On March 22, 1983, the president of the Caisse spoke of this purpose on CBC television on the program "Place publique," as he had done on other occasions.

At the federal level, the legislation is perhaps less expressive but there are, nevertheless, lyrical moments. For example, the Broadcasting Act charges the CBC with establishing a "national broadcasting service" pursuant to the objectives of section 3, one of which is to "contribute to the development of national unity and provide for a continuing expression of Canadian identity."[116] The recent Canagrex Act provides that this corporation "is established for the purposes of promoting, facilitating and . . . engaging in the export of agricultural products and services and food products and services from Canada to other countries."[117] The Export Development Corporation has a mandate to "promote and increase trade between Canada and other countries."[118] Petro-Canada has been given a fairly ambitious mission:

to engage in exploration for and the development of hydrocarbons and other types of fuel of energy . . . to engage in research and development projects relating to fuel and energy resources . . . to import, produce, transport, distribute, refine and market hydrocarbons of all descriptions . . . to produce, distribute, transport and market other rules and energy . . . to engage or invest in ventures or enterprises related to the exploration, production. . ..[119]

An important aspect of the goals of a Crown corporation is in keeping with the governments's own purpose: to advance the national or regional economy in any practical way. The government could simply use the more traditional means of intervention such as taxation, regulation or financial aid to private enterprise. But for more than 20 years, politicians have felt it necessary to intervene directly by setting up companies in the form of corporations or legal entities distinct from the government. This legal status gives such companies legal autonomy but at the same time the legislature has imposed many formal and informal controls designed to promote the express or implicit objectives of the legislature.

Formal controls are those set out expressly in the act. In the past 10 years they have become more numerous and precise. Many, if not most, of the constituent acts of the principal Crown corporations include the following characteristics:

- government appointment of directors;
- government approval of by-laws;
- government approval of the development plan;
- power to issue directives attributed to the responsible minister;
- control of management working conditions and of collective bargaining; and
- control of certain important financial management functions such as the budget, fee fixing, declaration of dividends, borrowing authority, real estate transactions, important contracts, expropriations, acquisition of share capital of companies.

Recent legislation gives the government the right to control or inspect anything that goes beyond the normal operations of the corporation, including all activities or operations that have a significant effect on the development of the company and on the realization of its basic purpose.

The great majority of Crown corporations are legally constituted as share capital companies, but with a single shareholder who happens to be the government! In the public sector, as in the private sector, one would expect the sole shareholder of a corporation to take a keen interest in the development and profitability of the company. In addition to the control mechanisms provided for in corporate law, that is, general or special shareholders' meetings, it is likely that there would be frequent informal contact between that shareholder and management. This is quite different from the situation in a large company where the share capital is held by hundreds of thousands of anonymous shareholders without blocking minorities.

As the former Quebec minister, Raymond Garneau, said in 1972, "the government cannot be satisfied with the powers of control accorded the shareholders by the Companies Act. In addition to being a shareholder, the state is responsible for the common good of the community, which it must never forget."[120] The government, as sole shareholder, has the

duty to monitor closely the development of corporations that share its own purpose, which is above all, to advance the economic development of the community. Moreover, as soon as there are problems in a corporation, public opinion and the opposition benches lose no time in demanding answers from the government, remember the disappointments from Samoco to REXFOR, from Marine Industries to the Société générale de financement, and the questionable performance of SIDBEC, the slow recovery of SOQUIP, and so on and, at the federal level, the unending debates on Canadair, de Havilland, Air Canada and Petro-Canada.

How can we object to informal contact between the government as sole shareholder and Crown corporations as long as Parliament or the provincial legislature is kept informed by the government?

The concept of the autonomy of decentralized institutions is not unequivocal: it appears in a variety of forms and shades. For example, the autonomy of administrative tribunals and other quasi-judicial regulatory bodies must not be confused with that of public corporations.

The case law has always insisted on the independence of administrative tribunals including quasi-judicial boards and commissions such as, at the federal level, the Canadian Transport Commission, the Canadian Radio-television and Telecommunications Commission, the National Energy Board and the Anti-Dumping Tribunal; and, in Quebec, the Commission des transports, the Régie des services publics, the Régie de l'électricité et du gaz, the Commission des valeurs mobilières, the Régie des marchés agricoles and the Régie des permis d'alcool. Because these bodies have to make decisions on individual rights by means of a quasi-judicial process, they must act independently, free from any pressure or intervention by government authorities, except when these authorities are expressly empowered by law to prescribe regulatory standards, to conduct preliminary investigations, or to intervene by means of review of appeal. As regards the autonomy of administrative tribunals, see the Supreme Court decisions in *Roncarelli v. Duplessis*, *P.P.G. Industries v. A.G. Canada* and *Anti-Dumping Tribunal, Innisfil Township v. Vespra Township and Ont. Municipal Board.*[121]

This autonomy is sacrosanct unless the law expressly provides otherwise. It must be respected and it generally is. In Quebec, even when the law expressly gives the government a right of review of appeal, as in s. 13 of the Farm Products Marketing Act, the government intervenes only very cautiously.[122] The same is true at the federal level.[123]

It must, of course, be recognized that the legislation has given public corporations autonomy in managing industrial, commercial or financial operations: the law itself limits this autonomy through many explicit controls. What criteria, then, will enable us to distinguish areas of autonomy from areas of control? Some have suggested distinguishing between what is part of the normal business of the corporation and what is not. This criterion is useful but not entirely satisfactory because many activities of

secondary importance enter into this second category; to subject them to control would be of doubtful effectiveness.

In my opinion, control should only be exercised when the development of the company and the realization of its basic objectives are at stake: and even then, we must distinguish between a priori and a posteriori controls. The latter are less onerous, and their significance in terms of accountability is considerable; they deal mostly with the obligation to inform personally the minister responsible, to table an annual report and to appear before a parliamentary committee. As for a priori controls, we must define which activities or operations are to be controlled and by whom: Cabinet, Treasury Board or the appropriate minister? In any case, it is important, on the one hand, to avoid an excess of control, which would bureaucratize the public corporation, but on the other hand, to strenghthen the idea of accountability.

Activities or Operations to be Controlled

At present the law applies government controls to 10 categories of activities or operations, which are discussed separately below.

Appointments

Three categories of persons occupy strategic positions in the public corporation: members of the board of directors, senior management and the auditor.

The Board of Directors and Senior Management The appointment of the members of the board of directors is a government prerogative that must not only be maintained but which must also be exercised with the utmost care. There are two exceptions to this rule: some semi-public corporations such as Telesat and the Canada Development Corporation and wholly or majority-owned subsidiaries of Crown corporations.

Is it necessary to distinguish expanded boards of directors made up of a greater number of persons as in large private companies? In both cases, the law imposes few limits on the discretionary power of the government other than to specify, in most cases, the length of the mandate.

There have been many complaints of political patronage in these appointments and of the chronic weakness of boards of directors.[124] The Lambert Report devotes many pages to this issue; it recommends that the board be essentially made up of members not belonging to management and recruited for their experience, that the chairman of the board be appointed by the government after consultation with the board and, finally, that the chief executive officer be appointed and removed by the board on the recommendation of the minister responsible with Cabinet approval.[125]

At present, the government has the power to appoint a chief executive officer, who is the person with the greatest responsibility to the government

and to Parliament. The rest of the management team is the exclusive responsibility of the board of directors, which is normal.

The Lambert Report's recommendation with respect to the appointment and removal of the chief executive officer raises questions of principle. Is it acceptable for the government, which formulated the policies being carried out by the public corporation, not to have the final say in the case of a disagreement with the board of directors of a Crown corporation? In my opinion, such a situation is intolerable in light of the principle of ministerial responsibility. For better or for worse, the chief executive officer must have the confidence of the minister and of the government. The chief executive officer is accountable for his management to the board, which is collectively accountable to government and to Parliament. If it is useful in large Crown corporations to have both a chairman of the board and a chief executive officer, there is no reason to believe, as the Lambert Report seems to suggest, that only the former "provides the formal link with Government and Parliament."[126]

Bill C-24 of June 29, 1984, devotes several provisions to the appointment, dismissal, remuneration, duties and the prevention of conflicts of interest of directors, chairmen and chief executive officers of parent Crown corporations (ss. 114 to 126). These provisions seem to be quite acceptable, including the ones that stipulate that salary schedules and other benefits are fixed by the Governor in Council.

The Auditor The function of the auditor is different in the public sector than in the private sector because in the former the auditor becomes an instrument of parliamentary control. This is why the law gives responsibility for auditing to the Auditor General or to an auditor appointed by the government. The scope of such audits is an important question that will be dealt with later.

Bill C-24 provides that the auditor of a parent Crown corporation shall be appointed by the government after consultation with the board of directors when an act provides that it is the Auditor General who exercises this function. Starting in 1989, however, the Auditor General will be appointed auditor or deputy auditor of all parent companies listed in Part I of Schedule C.

By-laws

In company law, the general or other by-laws of private corporations do not have to be approved before they come into force; they must, however, be approved by the shareholders at the next annual meeting.

At present at the federal level, the government has power to make by-laws in some cases (Canada Mortgage and Housing Corporation, Teleglobe Canada). However, in the great majority of cases, that power is vested in boards of directors, subject to government approval; this means either by-laws dealing with activities of the corporation (as in the case of Canada

Post Corporation, the Canadian Harbours Board, the Canadian Commercial Corporation, The Export Development Corporation, Canada Mortgage and Housing Corporation and Canagrex); or internal by-laws (as in the case of Petro-Canada and Air Canada). In a few cases, approval of the minister is required (Export Development Corporation); sometimes no such approval is required (Canada Development Corporation).

In Quebec, the power to make by-laws is, in many cases, vested in the government, whether it be general by-laws or by-laws governing the conditions of employment for management: Régie des installations olympiques du Québec, Société de récupération et de développement forestiers du Québec (REXFOR), Société nationale de l'amiante (SNA), Société de développement des industries culturelles (SODIC) and Société québécoise d'initiatives agro-alimentaires (SOQUIA). In certain cases, government regulation may even amend or specify the mandate of the corporation (RIO, SDI, SODIC, SNA).

In general, it seems that the logic of the system favours giving Crown corporations the power to make by-laws with respect to internal management, the management of supervisory personnel and their activities; it seems normal that these by-laws should be subject to government approval because they deal with standards that affect the long-term orientation of the corporation. However, only those by-laws that deal with relationships between the Crown corporation and third parties should come under the jurisdiction of the Regulations Act.

Bill C-24 proposes fairly significant innovations with respect to what it described as "by-laws" (s. 123). Such by-laws of parent companies passed by the board of directors must be sent to the minister responsible and to the President of the Treasury Board "immediately after enactment" (s. 123(2)). The Governor in Council may, by order, direct the making, amendment or repeal of a by-law. Finally, the Governor in Council may make regulations prescribing the content of the by-laws of parent companies and exempt a corporation or a specified class of corporation from the requirement of section 123(2).

It would seem that a posteriori control in the form of repudiation is preferable to a priori control by prior approval, which now exists in many statutes. Moreover, to allow the government to determine by order the "content" of the by-laws of such a corporation is an infringement on the normal powers of a Crown corporation.

Budgets

The power to approve budgets of Crown corporations is undoubtedly the most restrictive form of control. This power, which is much broader at the federal level than in Quebec, has been closely studied by many reformers during the past few years.

At the federal level, budget approval is required either under the terms of the Financial Administration Act or by virtue of a specific statute. Under

the terms of the former, so-called "agent" corporations must have their operating and capital budgets approved by Treasury Board whereas so-called "proprietary" corporations must have their capital budget approved by the same authority. For example, Teleglobe's constituent act provides that the corporation must submit a yearly operating budget to the minister responsible,[127] whereas Canagrex must submit its capital budget for approval.[128]

The 1977 blue paper recommended that the budgets of all Crown corporations be submitted for Cabinet approval and tabled in Parliament; as for "agent" corporations, they were also to have their operating budgets approved by the appropriate minister and by the Treasury Board; such a budget should be tabled in Parliament when, in the opinion of the government, it is likely to require ongoing appropriations.

In 1979, the Lambert Report recommended that all capital budgets requiring appropriations be approved by the minister responsible, Treasury Board and Cabinet, and tabled in Parliament; the operating budgets requiring appropriations would be approved by the same authorities but not tabled in Parliament; finally, capital budgets not requiring appropriations would only have to be approved by the minister responsible, the Minister of Finance and the Cabinet.

In 1979, Bill C-27 proposed a distinction between corporations relying ordinarily on parliamentary appropriations (Schedule I) and other corporations (Schedule II); the latter corporations are subdivided into two categories: those which enjoy a monopoly (A) and those which operate in a competitive market (B). Schedule I corporations must have their operating budget approved by the minister and by the Treasury Board. The capital budgets of Schedule I and II-A corporations must be approved by the same authorities. All these budgets must be tabled before Parliament.

Bill C-153, tabled on May 5, 1983, provides that:

> 70.(1) Each agency corporation shall annually submit to the appropriate Minister an operating budget for the next following financial year of the corporation for the approval of the appropriate Minister and the President of the Treasury Board.
>
> (2) Each agency corporation and proprietary corporation shall annually submit to the appropriate Minister the capital budget of the corporation for its next following financial year and the Minister shall cause the budget to be laid before Parliament after it is approved by the Governor in Council on the recommendation of the appropriate Minister, the President of the Treasury Board and the Minister of Finance.

The bill adds that the Governor in Council may require any wholly owned corporation to comply with the above provisions; he may also exempt them from these provisions.

One of the criticisms of the Lambert Report's recommendations is that they are an effort at homogenization that may be expensive and which

is not always justified.[129] Bill C-153 partially answers this criticism. Others consider this system of prior approval too haphazard.[130]

Bill C-24 (1984) operates differently from Bill C-153. Only parent companies in Part I of Schedule C must, in all cases, have their operating budgets approved by the Treasury Board whether or not there is a request for appropriations; the final text, therefore, differs from Bill C-24 on this point. The budget "shall encompass all the business and activities of the corporation and its wholly-owned subsidiaries if any, including their investments"; it must "set out information according to the major businesses or activities of the corporation." It is also provided that if the corporation, during the course of the financial year, foresees a significant increase in expenditures, it must have an amendment to the budget approved by Treasury Board (s. 130).

All parent companies and their wholly owned subsidiaries must have their capital budgets approved by Treasury Board (s. 131). The budget may be amended with the approval of Treasury Board upon recommendation of the appropriate minister. The Minister of Finance may also require that the capital budget have his approval as well as that of the appropriate minister.

In Quebec, budget approval is much less uniform than at the federal level. Only one corporation, the Société de développement coopératif, must have its budget approved by the government. La Société des alcools, REXFOR, the Société du Grand Théâtre and the Société de la Place des Arts must submit their operating budgets to the Treasury Board.

Finally, the following corporations must submit their operating and capital budgets to the appropriate minister: SOQUIJ, Loto-Québec, SOQUIA, SPICAM, the Société des traversiers and the Société Inter-Port.[131] Many other corporations, and not only the small ones, enjoy full budgetary autonomy: Hydro-Québec, SOQUEM, SOQUIP, SIDBEC, the Société de développement immobilier, the Société d'énergie de la baie James, the Société de cartographie, the Raffinerie de sucre du Québec, the Société du parc industriel du centre du Québec, the Société générale de financement, the Caisse de dépôt et de placement du Québec, the Société de développement industriel and the Société de développement des industries culturelles.

The Development Plan

The idea that a Crown corporation should have an approved development plan or corporate plan is relatively new. Few federal statutes made such provision before it was generally recommended in the 1977 blue paper. The Lambert Report follows this trend in recommending that "the chief executive officer be responsible for preparing a Corporate Strategic Plan for the approval of the board and for the information of the designated minister."

Bill C-27 (1979) proposed that each parent Crown corporation prepare an annual plan and submit it to the minister responsible, to the Minister

of Finance and to the President of the Treasury Board for government approval (s. 49). Finally, Bill C-153 (1983) provides that:

> 70 (3). Each agency corporation and proprietary corporation shall annually submit to the appropriate Minister for approval of the Governor in Council, a corporate plan for the corporation.

Since 1978, some constituent acts of Crown corporations in Quebec contain a provision stating that the corporation must submit its development plan and those of its subsidiaries annually for approval: this is the case with the Société nationale de l'amiante, the Société québécoise de développement des industries culturelles and the Société québécoise d'assainissement des eaux. For some existing corporations, the act has been amended to include a similar provision: for example SIDBEC, SOQUEM, the Société générale de financement du Québec, the Société nationale des transports, etc. In the case of the Société générale de financement, the corporation's charter was first amended in 1978 to oblige it to submit an industrial conversion plan for its subsidiary, Marine Industries.

As the Lambert Report recommended, a development plan should cover a period of three years or more. Its contents must be detailed enough for the government to acquaint itself with the projects and the strategies of the corporation. Approval of the plan, after discussion with the board of directors, the issuing of directives and approval of capital budgets, could replace the "complex web of multiple bureaucratic approvals attempting to make Crown corporations accountable to everyone in sight," according to Professor Prichard.[132]

Bill C-24 (1984) provides that parent companies must prepare a "corporate plan" each year. The plan shall be submitted to the appropriate minister and, if required by the regulations, to the minister of finance, for approval by the Governor in Council. The plan shall include information on the aims of the corporation, the objectives for the period of the plan and for each year in that period, and on the expected performance for the year preceding the first year in that period (as compared to its objectives in the last corporate plan). The act prohibits parent corporations and their wholly owned subsidiaries from carrying out any business or activity that is not consistent with the plan. A corporation may, however, submit an amendment to the plan during the financial year (s. 129).

Borrowing

At present, the companies governed by the Canada Business Corporations Act, as well as many statutory companies, have the authority to borrow on the capital markets: Canada Post Corporation, the Export Development Corporation, the St. Lawrence Seaway Authority, Air Canada, etc. In the context of public finance, the borrowing power is important because section 45 of the Financial Administration Act provides that "all money borrowed and interest thereon" by or on behalf of Her Majesty is a charge on and payable out of the Consolidated Revenue Fund.

The 1977 blue paper recommended that the borrowing power of the Crown corporations be expanded but that agent corporations' loans be approved by government order, and those of proprietary corporations by the Minister of Finance. Bill C-27 (1979) requires that the borrowing power of Crown corporations be approved only by the minister of finance and only for long-term loans; these loans are not binding upon the Crown unless the minister expressly guarantees them.

Bill C-153 (1983) proposed that, before borrowing, each wholly owned corporation obtain the approval of the minister of finance through the appropriate minister. Provisions for exemption and means of approval shall be determined by government regulation.

Bill C-24 of 1984 is more innovative. It provides that, except if it has the capacity and unless expressly empowered by an act of Parliament, an agent corporation can borrow only from the Crown; an appropriation act can include such permission (s. 110). Second, a parent corporation or a wholly owned subsidiary that intends to borrow must so indicate in its corporate plan, in which it must also indicate its plans and its strategy in this regard; the minister of finance can require that his own recommendation accompany that of the appropriate minister. Third, before entering into borrowing procedures, the approval of the minister of finance is required with respect to time and terms and conditions. Exemptions may be provided for by government regulation (s. 134).

Naturally, there must be coordination between the Minister of Finance and public corporations regarding long-term loans. Bill C-24 also contains interesting provisions that make loans dependent on the execution of projects set out in the development plan and in the capital budget.

Contracts

Many constituent acts of Crown corporations at the federal level and in Quebec provide that certain categories of contracts require government approval, usually by a minister. Thus, for example, the CBC cannot

> without the approval of the Governor in Council, enter into any transaction for the acquisition of any real property or the disposition of any real or personal property other than program material or rights therein for a consideration in excess of $250,000.[133]

The Société des alcools du Québec cannot "without the authorization of the Conseil du Trésor, make a contract respecting movable or immovable property in consideration of a sum higher than $300,000."[134] There are many such examples.

It makes no sense to control the contractual activity of a Crown corporation except in exceptional cases. Two reasons are invoked to justify these controls: the scope of the financial commitments and the fact that the contracts may go beyond the normal operations of the corporation. None of these arguments is convincing in the case of corporations that

already have a corporate plan and a capital budget. A contractual activity is an activity that is a means of attaining the objectives of the corporate management; it is management and its specialized personnel who have the expertise to attain these objectives. Confidence must be extended a priori; a posteriori controls, by the Auditor General or by Parliament, are quite sufficient. Finally, the government or the minister can always use its directive power to inform Crown corporations of the official policy on the granting of contracts.

The only exception to contractual autonomy is for contracts or agreements involving authorities reporting to different levels of government. These agreements may deal with elements of a global policy that go beyond the concerns of a public corporation. Many constituent acts have provided for such situations, especially in Quebec.

At the federal level, section 73 of the Financial Administration Act provides that the Governor in Council may make regulations with respect to the conditions under which an agent corporation may undertake contractual commitments. In Quebec, the Financial Administration Act provides for regulation by the Treasury Board only for contracts "made in the name of Her Majesty." Again, at the federal level, Bill C-24 expressly provides that the regulatory power of the Treasury Board does not apply to Crown corporations (s. 6). In addition, section 73 was repealed. The result is, therefore, more contractual autonomy, which is an excellent thing.

Directives

At the federal level, the power of the government or a minister to issue directives to Crown corporations appeared at the beginning of the 1950s. This practice gradually became more widespread without, however, affecting the majority of such corporations.[135] In 1975, the report of the inquiry into Air Canada recommended "a mechanism by which the Government can from time to time and when the national interest calls for it, give the Board of directors . . . directives with respect to general orientation."[136] The 1977 blue paper states that "a directive power with respect to all federal Crown corporations is essential if Crown corporations are to be effective instruments to achieving broad policy objectives." The Lambert Report proposes generalizing this power of the minister to issue government approved directives that have been tabled before Parliament. Bill C-27 (1979) contains similar provisions.

Bill C-153 (1983) does not mention directives. The Lambert Report had noted the concern of certain corporations in this regard and had said that directives should only be used sparingly by the Government as a last resort and that they should be subject to clearly defined constraints.[137]

Bill C-24 (1984) (s.99) proposes that, upon the recommendation of the appropriate minister, the Governor in Council may give instructions to a parent company "if it deems it to be in the public interest to do so"; the board of directors must, first of all, be consulted on the terms and

the effect of such instructions. Management must supervise "the speed and effectiveness of the implementation" of these instructions but cannot be held responsible for the consequences if they have acted in good faith and with diligence and skill (s. 124). The instructions must be tabled before Parliament within 15 days. Parent companies shall immediately advise the appropriate minister of the implementation of instructions received. These provisions seem to be well conceived and well formulated.

In Quebec, the directive power was introduced in 1975 and is now found in 10 constituent acts; the minister issues directives after government approval; they are subsequently tabled before the National Assembly.

Directives are, in fact, seldom used; that is why some critics doubt their usefulness: "Its greater availability as an instrument of control does not, however, guarantee greater accountability." [138] Others feel that it is a way for the government to communicate its will and that it may impose hidden costs. [139]

When the implementation of a directive entails additional identifiable costs, the blue paper and the Lambert Report recommend that the corporations receive reasonable compensation. Bill C-27 (1979) even makes such compensation mandatory. This suggestion has not been very well received.[140] Why, it is asked, should it appear that Crown corporations are being compensated for pursuing unprofitable objectives which are, in any case, part of their overall objectives as instruments of state intervention? Bill C-24 (1984) simply assumes that the parent corporation that follows these instructions is acting in its best interests (s. 99(5)). If the government wants to give special compensation to Crown corporations for performing special tasks of general interest that it has asked them to do, it may be encouraged to do so; individualization of uneconomic activities makes it easier to evaluate the performance of companies operating in a competitive market.

In my opinion, when directives are established in a proper legislative context, they are a good thing; but they are, and should remain, an exceptional means of control, reserved for very important aspects of policy and used only in exceptional circumstances. Actually, up to the present, if we look at the half-dozen directives issued to Petro-Canada, for example, or at the few directives issued to the Société québécoise d'initiatives agro-alimentaires or to the Société générale du financement, we can see that this is what has happened in Quebec.

Declaration of Dividends

In all of the constituent acts of Quebec share-capital Crown corporations, the Minister of Finance or the appropriate minister is empowered to declare dividends. At the federal level on the other hand, it seems that the board of directors almost always acts independently. However, section 71 of the Financial Administration Act authorizes the minister responsible and the Minister of Finance, with the approval of the Cabinet, to direct a corpora-

tion governed by the act to "pay to the Receiver General so much of the money administered by it . . . in excess of the amount required for the purposes of the corporation." Some corporations, such as Petro-Canada, are exempt from section 71.

Why not give the power to declare dividends to the board of directors when the government has already approved the development plan and has the power to issue directives? When corporations realize significant profits, the board of directors should have the right to reinvest or declare dividends, subject to government directives.

The Creation or Acquisition of Subsidiaries and the Transfer of Shares

Some constituent acts provide that the purchase of the share capital of a private company must be approved by the government or the responsible minister. Nevertheless, the 1977 blue paper expresses concern that subsidiaries may be created without official government approval: thus, a corporation may "remove the management of an activity from the supervision of the government and Parliament, or undertake an activity via a subsidiary that is denied to the parent corporation by its act of incorporation."[141] The Lambert Report adds that the creation of subsidiaries should be expressly authorized by the act and should have government approval.

As we have seen, Bill C-153 of 1983 proposed a complex system whereby government approval was required for the creation of any corporation or subsidiary, for the acquisition of shares that would make the government the proprietor, or for any disposal of shares or of all or substantially all the assets. Bill C-24 of 1984 contains approximately the same requirements with respect to prior approval with a few exceptions; exemptions, however, may be made by regulation (s. 102).

In my opinion, these provisions confuse two realities: the necessity of informing Parliament of these issues and the advisability of requiring a priori control of operations that do not lend themselves to this type of control, for example, the acquisition of the share capital of private companies. If a parent corporation is authorized to play the game of corporate law and to buy stocks and shares on the stock market, one can imagine that any delay could be extremely detrimental. To be profitable, such transactions must be accomplished with discretion and often with great speed.

Therefore, there should be a distinction between incorporating a company and acquiring shares on the stock market; in the latter case, only a posteriori control by means of a detailed report would be required to inform both the government and Parliament.

Reports and Information

With Crown corporations, we often find a type of a posteriori control that requires annual or quarterly reports or other types of information. All constituent acts require annual reports at least, and several other acts

require other forms of control. These controls are necessary, but how far should they go? Surely the minister should have the power to require, in addition to an annual report, any type of information on the organization, the operation and the activities of a public corporation. It would then be up to the minister to publish only what is required by the public interest and the interests of the corporation.

The Lambert Report deals briefly with annual reports and reports that may be required by the minister responsible. Bill C-27 of 1979 devotes several sections to this matter. Bill C-24 of 1984 requires that parent corporations file an annual report and specifies its contents: financial statements, auditor's report, statement of steps taken to achieve objectives, information required by the Treasury Board with respect to performance and other information required by an act, by the responsible minister, by the President of the Treasury Board, or by the minister of finance; the Treasury Board may, by regulation, specify what information must appear in the annual report, which must clearly set out information according to the principal businesses or activities of the corporation and its wholly owned subsidiaries (s. 152).

Bill C-24 also provides that parent corporations must, on demand, submit to the appropriate minister or the Treasury Board, the accounts, budgets, financial statements, documents, reports and other information requested. In addition, the chief executive officer of a corporation must immediately advise the minister responsible and the president of the Treasury Board of any change, especially in the financial situation, that might have significant consequences for the performance of the corporation or that of wholly owned subsidiaries.

Finally, Bill C-24 provides that the president of the Treasury Board shall, each year, lay before Parliament a consolidated report on the activities of all Crown corporations. This report must also contain a list of all Crown corporations and all corporations whose shares are held on behalf of or in trust for the Crown or any Crown corporation, data on employment and finances including aggregate borrowings and all other information.

All of these measures will give Parliament and the public sufficient information on the economic public sector. Such a report is unusual and will require a considerable amount of work. We hope that it will not lead to a cumbersome bureaucracy that will be fatal to the dynamism of Crown corporations, which is the primary factor in efficiency.

The Controllers

The choice of who controls each category of activity is not inconsequential. It might be the Cabinet, the Treasury Board or a minister, or a combination of them. This is a very delicate question and the recent legislation in this regard is not particularly coherent or rational.

The Cabinet

The Governor in Council, or the Cabinet, should only have to consider activities of a general nature that have a wide influence. There seem to be five categories of activity that fit this requirement: appointments, development plans, incorporation of new companies, by-laws and directives. Naturally, the responsible minister is charged with briefing the Cabinet on these matters.

Many categories of activities or operations that now require Cabinet approval or authorization, such as expropriations, some important contracts, and long-term borrowing, should be included in the development plan.

It is clear that there should be, at the level of the Privy Council (or the Conseil executif in Quebec), a unit for supervising and controlling the network of Crown corporations. In Quebec, the Conseil executif has a secretariat responsible for Crown corporations, but it seems to consist of a person who acts as an adviser. It is not actually an administrative unit. In Ottawa, the government operations section of the Privy Council has a unit that basically consists of one person who is responsible for Crown corporations. The Treasury Board in particular has also played an active role with respect to Crown corporations.

It is difficult to imagine that effective working groups could be established at all three levels: Cabinet, Treasury Board and ministry. A choice would have to be made.

The Treasury Board

At the federal level, the Treasury Board serves an important function as financial controller of the parent companies under Schedules C and D of Bill-24 as well as of any corporation whose shares are wholly owned, directly or indirectly, by the government or on its behalf and which is subject by order to the same control; this could conceivably be a wholly owned subsidiary of a Crown corporation.

The fundamental question is whether the Treasury Board's role, with respect to Crown corporations, should be similar to its role with respect to government departments. The answer is obviously no, since only capital or operating budgets have to be approved by the Treasury Board.

The Treasury Board is the appropriate authority for verifying that the capital budget conforms to the objectives of the act and to the corporate development plan and for ascertaining its feasibility in view of the constraints generally applicable to public finance (borrowing, government guarantees, etc.).

The Minister Responsible or the Appropriate Minister

The appropriate minister, or the person designated by the act as being responsible for the application of the said act, plays a decisive part in the

control of Crown corporations. He or she is the main link between the Cabinet, the Treasury Board and the Crown corporation. The minister's primary function is to receive the annual or quarterly reports and to obtain any information relevant to the organization and operation of the corporation. To this end, the constituent acts should require that the corporations submit their operating budgets to the minister; this is, in fact, necessary when the corporation receives annual appropriations that the minister must defend before the Treasury Board and before parliamentary committees.

The second basic function of the appropriate minister is the "power to issue directives." At the federal level, certain acts confer this power upon the Cabinet while others give it to the minister; in Quebec, this power is usually allocated to the minister responsible, although the government must approve all directives.

In my view, these directives should always be approved by the Cabinet and tabled in the House, where they can be debated within a reasonable period of time. In this regard, Bill C-4 (1984) contains interesting provisions that generalize the power to issue directives to parent corporations (s. 99). The Governor in Council issues such directives on the recommendation of the appropriate minister.

If the first two functions of the minister are well executed, then perhaps the other forms of control that appear in the various statutes are not necessary. In Quebec, certain corporations require ministerial approval of their budgets: for example, the Société québécoise d'information juridique, Loto-Québec, the Société québécoise d'initiatives agro-alimentaires and SPICAM. In most cases, these are corporations that do not require appropriations. In other cases, ministerial approval is required for certain contracts, certain purchases and certain work. These controls are not justifiable given the rationale for the existence of a Crown corporation, which requires a considerable degree of autonomy to attain its objectives. Such corporations should be judged by their performance according to certain pre-established criteria; if they must constantly seek approval, how can they be evaluated? Moreover, what guarantees that the controller is more expert than the entity he controls?

It has been suggested that some ministers or government departments are not very serious about their "supervisory" functions. Others have set up large divisions for coordinating Crown corporations within their sector. In Quebec particularly, such a division is run by a deputy minister in the Ministry of Energy and the Ministry of Industry. If each ministry did its work well, then the central bodies would find that their workload was considerably reduced.

The Minister of Finance

It is standard practice for the Minister of Finance to be informed of the borrowing plans of Crown corporations and for him to approve them when required, particularly in the case of long- or medium-term loans.

Parliamentary Control

In 1976, the Auditor General of Canada alerted the public to the fact that Parliament had almost lost control of events in the public industrial and commercial sectors. Parliament now rarely takes part in the creation of institutions in this sector, it is not informed, or very little, of their organization and operation and is not in a position to evaluate their performance.

It became apparent that the Financial Administration Act covered only some of the corporations in the public sector and that even though the Act provided that a "Crown corporation was one which, in the last analysis, must account to Parliament," accountability was largely deficient.

Up until that time, Parliament had four traditional means of control at its disposal. First, it could create certain Crown corporations by enacting constituent acts, although the majority are not established in that way. Second, the government answered questions asked in the House: however, since the government was itself not well informed, this exercise was often rather futile. Third, there was a discussion of supplies or appropriations in parliamentary committees when such appropriations were to be used to capitalize or to subsidize Crown corporations. Crown corporations have been forgotten in the study of appropriations, and they have only rarely attracted attention as, for example, with regard to the CBC. Fourth, there is the annual review of the Auditor General's report and of the public accounts by the Public Accounts Committee. In 1976, it was that committee which complained of not being adequately informed and of not being able to exercise sufficient control.

In his 1981–82 Report, the Auditor General reviewed the evidence and the recommendations that had been made in an attempt to improve the accountability of Crown corporations to Parliament: the 1977 blue paper, the Auditor General's Reports since 1976, reports of the Public Accounts Committee, the Report of the Royal Commission on Financial Management and Accountability (Lambert Report), Bill C-27 (1979) and finally Bill C-123, which became Bill C-153 (1983).

Considerable progress has been made on three fronts. First, the tightening of controls exercised by other controllers, particularly the Treasury Board and the Auditor General, helps indirectly but considerably to improve parliamentary control. Second, a new acute awareness by parliamentarians has produced an unprecedented resurgence of vigor in the Public Accounts Committee and in the House during question period or during debates on the constituent acts of major new Crown corporations such as Air Canada, Petro-Canada and Canagrex: in the past few years, thousands of pages have been published in the Commons *Debates* on Crown corporations. Third, firm proposals for legislative amendments relating to parliamentary control were set out in the 1977 blue paper, in Bill C-27 (1979) and in Bill C-153, which we will examine more closely with respect to the specific role of Parliament.

At the federal level, there are three main mechanisms of parliamentary control: the House, during question period or during debates of bills, the Public Accounts Committee and various parliamentary committees.

In the House, there is ample opportunity, especially for the opposition, to force tight control over the creation, organization, operation and profitability of the network of Crown corporations. From 1980 to 1983, the Commons debates show that Parliament had a keen interest in Crown corporations; numerous pertinent questions and criticisms confirm Parliament's considerable vigilance.

As for the Public Accounts Committee, its work since 1976 has been unusually rigorous. It has issued more than 15 useful reports, in particular the second report on April 11, 1978, on Crown corporations in general: the fourth report, on February 20, 1981, on control and accountability, and the fifteenth report, on May 20, 1982, on the financial statements of Eldorado Nuclear. The Committee has made recommendations on the creation, classification, financing, financial management practices, auditing and annual reports of the corporations, as well as on the role of central agencies in relation to the corporations.

The sectoral committees, for their part, take an interest in Crown corporations either when discussing appropriations or when the acts are amended. In the debates of the Standing Committee on Broadcasting, many pages are devoted to the CBC, the Canada Film Development Corporation, Telesat, the National Arts Centre, and so on; the Standing Committee on Natural Resources and Public Works has taken an interest in Petro-Canada, Atomic Energy of Canada and Eldorado Nuclear; and the Standing Committee on Transportation has studied Air Canada, CN and VIA Rail.

In Quebec, parliamentary control of Crown corporations is exercised in the House mostly during votes on constituent acts or amendments to those acts, which have greatly increased in the past few years. On the other hand, specific parliamentary committees are a preferred forum for reviewing these bills as well as for reviewing the development plans of corporations or requests for appropriations.

In Quebec, the first important manifestation of parliamentary control of public corporations, other than voting appropriations, took place when Hydro-Québec first appeared before the committee dealing with industrial and commercial boards on August 4, 1967. This parliamentary committee was established on January 21, 1965.[142] It was

> authorized to deliberate and to investigate any issues and any matter which the House referred to it and which was within its jurisdiction; to issue reports from time to time, expressing its observations and its views on such matters and to have access to the people, the documents and the information which it requires.[143]

In 1968, it studied the cases of Hydro-Québec, SIDBEC and SOQUEM. Regarding the question of the establishment of a steel mill in Quebec, which

was then a controversial question, the parliamentary committee heard the mayor of Bécancour, accompanied by a group of mayors from the region, representatives of public agencies and workers from the Dosco unions. The committee held many hearings in 1968 to study the government's policy with respect to wages and its effect on a strike at the Régie des alcools du Québec.[144] The committee's task was ". . . first of all to examine the principles of a comprehensive formulation of a policy with respect to wages."[145] It monitored the progress of the negotiations and heard representatives from the unions involved in the conflict.

Since the demise of the committee, Crown corporations have appeared before the parliamentary committee responsible for the sector in which that corporation operates. Hydro-Québec has been the centre of attention and is the only corporation to appear regularly; it did so on May 20, 1969, to answer the members' questions on its annual report and on the major impending contract with Churchill Falls; on December 15, 1969, there were public hearings on the sharing of responsibilities between Hydro-Québec and private enterprise in the construction of Manic 3; on December 9, 1970, Hydro commented on its annual report; on May 19 and 20, 1971, it was heard on the question of the development of James Bay.[146] On May 11, 1972, it commented on its annual report. On May 16, 18 and 25 and on June 1, 1972, representatives of Hydro-Québec and of the Société d'énergie de la Baie James were asked about equipment and management problems relating to the development of James Bay.

It was in 1973 that two important matters brought the problem of parliamentary control of public corporations to the attention of the public: Hydro-Québec's rate increase and the electrical development of the Jacques Cartier River. Increased use of parliamentary committees and the popularity of their public hearings led the government to submit Hydro-Québec's rate increases to the Standing Committee on Natural Resources, Lands and Forests for review and approval and, under pressure from environmental protection groups, it submitted the Chamigny project, to be built by Hydro-Québec on the Jacques Cartier River, to the Parliamentary Committee on Industry and Commerce.

In 1978, the opposition tabled a motion for the reappointment of a Standing Committee on Crown corporations.[147] There followed a major debate on the need for parliamentary control of these corporations. That debate took place mostly before the Parliamentary Committee of the National Assembly.

For the past few years, parliamentary control has been exercised mostly through various parliamentary committees with regular appearances by the president or other representatives of the corporations; since 1976 this has been the case especially with SOQUEM, SOQUIP, SIDBEC, the Société générale de financement, the Société d'énergie de la Baie James, the Société de développement de la Baie James and Hydro-Québec.[148]

During the past 10 years, we have witnessed a considerable increase in parliamentary control over Crown corporations in Quebec. Many statutes

have been enacted to amend the charters of most of these corporations: this has given rise to debate on the general orientation of the government's policy with respect to these corporations. The creation of new corporations, particularly the Société nationale de l'amiante, provoked long and heated debates in committee; there have been long discussions on the advisability of setting up Crown corporations, on their role and so on.[149]

The government has adopted the practice of tabling in the House not only annual reports but also other documents concerning Crown corporations. In addition, there are many statutes that require that directives which can be formulated and issued to corporations by various ministers be tabled before the National Assembly. These directives and other documents have recently given rise to very informative debates.[150]

Bill C-24 of June 29, 1984, stipulates that "each Crown corporation is ultimately accountable, through the appropriate Minister, to Parliament for the conduct of its affairs." This provision, which did not appear in Bill C-24 tabled on March 15, 1984, simply restates the existing law, namely, that Crown corporations, as creatures of Parliament, are responsible to Parliament through the intermediary of a minister who acts as their spokesman in the House.

This statement of principle is of the utmost importance and is in contrast with several statements that appear in the parliamentary debates stating that the appropriate minister must be answerable in the House for all activities of Crown corporations, as if such corporations were part of the government department for which he is responsible. This amounts to an obvious misunderstanding that contradicts the very principle of the institutional autonomy of Crown corporations and destroys the raison d'être of this network of corporations, which is based on the idea of decentralization, in other words, giving legal entities that are distinct from the government their own powers for which they themselves are responsible to Parliament. To ask the appropriate minister to take responsibility for all activities of a public company is to distort the system and to reduce to a short period of time the actual accountability of the board of directors, who are the real and primary custodians of power in the corporation.

Parliamentary control of economic public sector institutions is not, however, a panacea; it must be used carefully. While it is normal for Parliament to have a right of inspection over Crown corporations, their operations, their activities and their performance, a distinction must be made between what is subject to prior control and what is subject to a posteriori control.

In general, parent companies should be created by means of a constituent act debated and enacted in the House. If the government feels that it is justified, for unusual or particular reasons, in creating such corporations by issuing letters patent or tabling statutes pursuant to a general act of incorporation, such a decision should be made by order, tabled in the House and submitted to a possibility of affirmative or negative resolution

as proposed in Bill C-153. Bill C-24, provides that when there is no act authorizing the establishment of a corporation, acquisition of shares and dissolution or merger of the corporation, a minister may table in both Houses of Parliament a motion authorizing him to proceed by order. Within thirty days, continuous debate of seven days shall take place before the vote (s. 153).

Bill C-24 of June 29, 1984, is more restrictive. It requires an Act of Parliament giving prior approval for the following operations: incorporation of a corporation; receiving of grants; application for articles that would add to or otherwise make a material change in the objects of a parent company; disposition of any shares; dissolution or amalgamation of a parent company; and disposition of all or substantially all of the assets of a parent company (s. 100). Most of these operations must also be approved by order of the Governor in Council (s. 101). Thus, the idea of a posteriori parliamentary control has been abandoned.

This issue is just as important when all of the outstanding shares of a private corporation are being acquired, which amounts to nationalization even if by mutual agreement. I agree that an order authorizing such an acquisition should be tabled in the House and that Parliament should be able, by way of resolution, to question such an acquisition when the conditions are excessive or contrary to the public interest. Such a threat is contrary to the spirit and principles of corporate law and may constitute an element of legal uncertainty. Nevertheless, the public interest may have been ignored, and it is up to the sovereign Parliament to intervene in cases where the government has deemed it preferable to proceed other than by means of a nationalization-expropriation statute. It should, however, be pointed out that a negative resolution is appropriate only if "the conditions of the acquisition are abusive and contrary to the public interest."

It is also very important to be able to debate orders that add newly acquired corporations to schedules C or D of the Financial Administration Act or to the schedule of the Government Companies Act. Since this order confers prerogatives and imposes public law constraints upon corporations, it should be debated in Parliament.

The Lambert Report did not go so far as to provide for control of the establishment of corporations or subsidiaries pursuant to the Canada Corporations Act or the acquisition of subsidiaries.[151] It does not suggest that the corporate plan be tabled before Parliament, but it does recommend that directives be so tabled without delay and be duly reported in the annual report of the corporation. It proposes that all budgets calling for subsidies be approved by Parliament while capital budgets not calling for subsidies need only be tabled before Parliament. Finally, it proposes that even the by-laws of Crown corporations be tabled before Parliament.

Bill C-24 contains three interesting proposals with respect to parliamentary control. Their purpose is to keep Parliament better informed. Section 132 provides that a parent company, once its corporate plan, operating

budget and capital budget are approved, shall prepare a summary, approved by the minister responsible, to be tabled in both Houses of Parliament; this summary is automatically passed on to the appropriate parliamentary committee. Second, a considerably improved version of the annual report of each corporation will automatically be sent to the same parliamentary committee (s. 152). Finally, the president of the Treasury Board shall, each year, table before Parliament a consolidated report of the activities of all parent companies (s. 153).

In my opinion, at both the federal level and in Quebec, the emphasis should be on the activities of the standing committees and the special committees of Parliament. These committees could acquire considerable expertise in the control of Crown corporations because they study the development plans of corporations, the bills affecting them, governmental directives and annual reports. It has often been recommended that the annual reports be more substantial; Bill C-27 (1979) also proposed that they be automatically submitted to the appropriate parliamentary committee. Bill C-24 (1984) contains similar provisions (s. 152(3)).

I do not believe that it is desirable for a single parliamentary committee to be the only forum for monitoring and controlling all public corporations, as is the case in British Columbia and Saskatchewan.[152] In Quebec, such a proposition was debated at length and finally abandoned. In my opinion, special committees, particularly in fields such as energy, transportation, industry and cultural affairs, can have a thorough knowledge of the problems. The committees should also be provided with the Auditor General's reports, especially in the case of a comprehensive audit or a thorough legislative audit.

In Ottawa, the Public Accounts Committee will probably continue to be concerned with Crown corporations, but since its interest in Crown corporations is from the point of view of financial management, there does not seem to be unnecessary duplication of the work of the various standing committees. The work of these committees may be complementary.

In Quebec, the Commission des finanances et des comptes publics which replaced the Comité des comptes publics, has met only sporadically since it was established: in 1946 and 1966, then in 1974, 1975, and 1981. That is when the official opposition proposed that the committee sit regularly with a permanent mandate so that it could "contribute significantly in encouraging economy and efficiency in public spending" (translation), that those in charge of spending and program administration have access to all pertinent information and that it be chaired by a member of the opposition.[153] Mr. Parizeau answered for the government that this constituted an in-depth reform which the government was considering but which could not be introduced by a single motion in committee. Following the 1984 reform, it is the committee of the National Assembly that will have jurisdiction to receive and study the Auditor General's reports; the con-

trol of Crown corporations will remain with the various special committees.[154]

The Auditor General

For the past seven or eight years, the Auditor General has devoted a great deal of attention to Crown corporations; in fact, the control of Crown corporations has become one of his main preoccupations, particularly at the federal level.

Two very pressing questions must be asked about this controller, who is extremely important to our parliamentary democracy. First, should his general mandate be to control all Crown corporations? Second, can this control take the form of a comprehensive audit?

The Auditor General is a servant of Parliament but is independent of both the government and Parliament itself. He exercises a posteriori control of the accuracy and propriety of public accounts, in other words, the financial management of the public service. That includes not only the public service, but also over half the Crown corporations. At the federal level, his mandate has, however, been much broader since 1978.

"Rationae Personae" Jurisdiction

Section 67 of the federal Financial Administration Act provides that the accounts of Crown corporations must be audited and that if an auditor is not appointed by the constituent act, he must be appointed by the Governor in Council. Notwithstanding any other act, the Auditor General can always be appointed as the auditor of a Crown corporation. At present, corporations under schedules B and C are all audited by the Auditor General; 75 percent of the corporations under schedule D are audited by the Auditor General and all others by private auditors. In his 1981–82 report, the Auditor expressed serious reservations about this situation because private auditors do not seem to have the same approach as a public auditor whose basic task is to inform Parliament.

One can only agree with this point of view. If, as the 1979 Report says, Parliament "has the right and the duty to ensure that the Crown corporations are accountable for achieving the objectives of government policy" (translation), no one is better qualified in terms of motivation, independence and expertise to ensure a more complete audit than the Auditor General. Bill C-24 of June 1984 does not provide that the Auditor General shall be the auditor for Crown corporations, but from 1989 the Auditor General will be appointed by the government as auditor or co-auditor of the corporations listed in Part I of Schedule C; he can, however, refuse this mandate (ss. 141 et seq.).

In Quebec, the situation is no better. For years the Auditor General of Quebec has been criticizing the irrationality of appointing auditors for

"Quebec government corporations."[155] According to the Quebec Financial Administration Act, the Auditor General "shall audit accounts relating to the Consolidated Revenue Fund" (translation); this expression covers accounts of revenue that feed the Consolidated Revenue Fund and other similar accounts as well as expenditure accounts related to supplies voted by the National Assembly. In principle, therefore, the accounts of Crown corporations are not within the competence of the Auditor General except if they are related to the use of grants received from the Government of Quebec. Otherwise, each constituent act determines who shall audit the accounts of the corporation.

In his 1982 and 1983 reports, the Auditor General regrets that there is no adequate statute dealing with government corporations that makes provision for the appointment of auditors. In his 1983 report, he goes much further. He proposes the enactment of a general law to provide for the appointment of an auditor, the scope of the audit and the role and responsibilities of auditors, as well as the means of presenting the report to the National Assembly. He seems to hope that his office will be appointed as auditor for reasons identical to those mentioned at the federal level.

At present, the Auditor General has responsibility for auditing 54 parent companies and seven major subsidiaries. On the other hand, 15 of the most important Crown corporations are outside his control: they include Hydro-Québec and its subsidiaries, the Régie des installations olympique, SIDBEC and its subsidiaries, the Société de développement de la Baie James and its subsidiaries, the Société de développement coopératif and its subsidiaries, the Société des alcools du Québec, the Société générale de financement and its subsidiaries, the Société nationale de l'amiante and its subsidiaries, and the Société québécoise d'assainissement des eaux. In addition, 16 wholly owned subsidiaries of Crown corporations do not come under his control.[156]

"Rationale Materiae" Jurisdiction

Both at the federal level and in Quebec, the Auditor General's mandate is essentially and exclusively to carry out a "legislative" audit, or to verify that the accounts have been kept faithfully and properly. Whereas in the private sector, an audit certifies that the financial statements accurately represent the situation of the company, in the governmental public sector the auditor must also verify that legislative authorizations have been complied with and that money has been spent as authorized.

The federal Financial Administration Act provides that the Auditor General's report shall indicate whether the financial statements "give a true and fair view of the state of the corporation's affairs . . . and whether, in his opinion, the corporation's activities have been within the powers of the corporation . . ." (translation).

There is a third type of audit: a comprehensive or integrated audit introduced at the federal level by the Auditor General's Act of 1977 and applicable to the federal administration as a whole, except for the Crown corporations. Section 7 of the Act provides that the Auditor General's report must bring to the attention of the House situations where he has observed that:

(a) accounts have not been faithfully and properly maintained or public money has not been fully accounted for or paid, where so required by law, into the Consolidated Revenue Fund;
(b) essential records have not been maintained or the rules and procedures applied have been insufficient to safeguard and control public property, to secure an effective check on the assessment, collection and proper allocation of the revenue and to ensure that expenditures have been made only as authorized;
(c) money has been expended other than for purposes for which it was appropriated by Parliament;
(d) money has been expended without due regard to economy or efficiency; or
(e) satisfactory procedures have not been established to measure and report the effectiveness of programs, where such procedures could appropriately and reasonably be implemented.

This third type of audit, which is well named, is all the more comprehensive and complete because of the considerable authority of the auditor to carry it out. At the federal level, for example, section 76 of the Financial Administration Act provides that:

> The auditor is entitled to have access at all convenient times to all records, documents, books, accounts and vouchers of a corporation, and is entitled to require from the directors and officers of the corporation such information and explanations as he deems necessary.

And, section 14 of the Auditor General's Act of 1977 adds:

(2) The Auditor General may request a Crown corporation to obtain and furnish to him such information and explanations from its present or former directors, officers, employees, agents and auditors or those of any of its subsidiaries as are, in his opinion, necessary to enable him to fulfil his responsibilities as the auditor of the accounts of Canada.
(3) If, in the opinion of the Auditor General, a Crown corporation, in response to a request made under subsection (2), fails to provide any or sufficient information or explanations, he may so advise the Governor in Council, who may thereupon direct the officers of the corporation to furnish the Auditor General with such information and explanations and to give him access to those records, documents, books, accounts and vouchers of the corporation or any of its subsidiaries access to which is, in the opinion of the Auditor General, necessary for him to fulfil his responsibilities as the auditor of the accounts of Canada.

Bill C-24 of June 1984 contains two provisions with respect to auditing. One is intended to facilitate access to information (s. 146). The other provides that the auditor is not authorized to express an opinion on the advisability of matters of orientation, especially with respect to the aims of the corporation, on limitations on its activities, on its objectives, on commercial decisions or decisions with respect to the orientation of the corporation or of the Government of Canada (s. 147). It does not authorize a comprehensive audit but does not exclude it, at least within certain limits.

In Quebec, a comprehensive audit will soon be introduced for all of the public service following repeated complaints by the present Auditor, Mr. Chatelain.[157] There has been strong resistance in government circles to extending the mandate of the Auditor General; in 1981, the opposition made similar demands but Mr. Parizeau answered in the House that it was not easy[158] to monitor the quality of administrative and financial management or procedures for evaluating program efficiency, or to control resource optimization or performance.[159]

What was needed most was an internal system of program evaluation and auditing; such a system was introduced in 1980. As for the reform of the external audit, in November 1982, the Prime Minister asked the Auditor General to draw up a draft bill which was submitted in May, 1983. Bill 90 was tabled in the spring of 1984.

There is, however, a much more delicate question that has not been answered in either Quebec or Ottawa: is comprehensive auditing suitable for public corporations? In 1979, the Auditor General of Canada recommended a comprehensive audit for Crown corporations. At that time, the Auditor General's office undertook, on a voluntary and experimental basis, to audit six corporations.[160] In 1983, the Auditor General of Quebec also called for the standardization and the extension of the scope of audit activities; however, this seemed to apply only to the "quality of the financial and administrative management" (translation). He recommends that the audit function be included in a general law on public corporations.[161]

I share the concern of those who oppose the introduction of an external comprehensive audit into the network of industrial, commercial and financial Crown corporations. I am certainly in favour, however, of the idea that all corporations and all government departments should be subject to an in-depth comprehensive internal audit and that, in the case of Crown corporations, the auditor's report should be submitted to the minister responsible.

In this regard, Bill C-24 of June 1984 makes it obligatory for parent companies to form an internal auditing committee made up of directors and to carry out an internal audit; it also specifies the functions of the auditing committee (s. 150 and 183(3)). In addition, the Act requires that each parent company carry out a special investigation of its operations and those of its wholly owned subsidiaries every five years or at the request of the government or of the appropriate minister; the aim of such an inves-

tigation is to check the efficiency of the systems for financial control and information, management control and information and management practices (s. 143).

An external audit of the performance of a Crown corporation, especially those which operate in the commercial and industrial sectors and in competitive fields, is a challenge that can be met only by marshalling considerable human and financial resources and by perfecting methods and criteria that are apparently not yet ready to be implemented.[162]

Before introducing the external comprehensive audit, it was wise for the sake of informing the legislature, to proceed with an experimental and exploratory phase. Presumably the proponents of this reform have made a thorough study of foreign models, particularly the French Cour des comptes, the imposing body of French government auditors that spends over half its time carrying out a comprehensive audit of the huge network of French public corporations.

Conclusion

Although the Constitution does not impose any limits on the expansion of the federal or provincial public sectors, it does impose limits on legislative or government activity with respect to the creation of public corporations because of the division of legislative powers under the federal system and because of the constitutional rules attached to the royal prerogative.

When a government proceeds by means of voluntary nationalization or by mutual agreement, it is in the same situation as a private individual; it can take advantage of laws of general application, and it is subject to the same constraints. On the other hand, nationalization-expropriation is subject to specific constitutional rules that the courts have applied with a degree of flexibility. In any case, as the Supreme Court said in 1984, the courts will be careful "to consider the desirability of the statute from the social and economic point of view"[163] (translation). In 1979 the same Court added, in the Saskatchewan potash case:

> Where governments in good faith, as in this case, invoke authority to realize desirable economic policies, they must know that they have no open-ended means of achieving their goals when there are constitutional limitations on the legislative power under which they purport to act. They are entitled to expect that the Courts, and especially this Court, will approach the task of appraisal of the constitutionality of social and economic programmes with sympathy and regard for the serious consequences of holding them *ultra vires*. Yet, if the appraisal results in a clash with the Constitution, it is the latter which must govern. That is the situation here.[164]

Unless provision is made in the Constitution itself, it is not clear how it can be legitimate for Parliament to impose limits on the expansion of the provincial pubic sector or how the legislatures can use restrictive laws to

impede the development of federal public corporations. Parliament can exercise its full jurisdiction in economic matters, but it should not be allowed, in the name of equality before the law and pursuant, at least in spirit, to section 15 of the 1982 Constitution Act, to discriminate between public and private corporations.

On the other hand, as will be suggested later on, we must put an end to the system of privileges and prerogatives enjoyed by Crown corporations designated as Crown agents, most of which are not justified.

As regards the corporate status of Crown corporations, I recommend that, except in exceptional cases, each parent company have a constituent act that can be debated in Parliament or in the legislature. On the other hand, the legal structure should be one of share capital or joint stock, according to the general laws on commercial corporations, which should have a residuary application. The advantages of this legal form have been pointed out recently in both Ottawa and Quebec City.

Of course, a minister can be empowered to procure the incorporation of a Crown corporation with the approval of the Cabinet, but this should be an exception.[165] The government should then table a draft constituent act to regularize the procedure.

As many others have said: the mandate of Crown corporations should be set out as clearly and completely as possible in the constituent act. This is the only way to inform Parliament of the content of the government policy that is to be implemented by the Crown corporation; it is also the only possible way to evaluate performance and the attainment of objectives. Then the development plan and the minister's directive power more readily become an extension and an expression of this mandate.

Should the status of Crown agent in the case of industrial, commercial or financial public corporations be abolished? Some authorities think so. R.P. Barbe has argued that "if the State wants to become a merchant, an industrialist or a financier, it should, in principle, assume the status of merchant, industrialist or financier" (translation).[166] This proposal concerns only public bodies with an economic aim and not all public bodies. Moreover, it is not based on satisfactory evidence. Indeed, this issue has not as yet been examined in depth. The legislature has only recently shown an interest in this issue, for example, during the debates on the act to establish the Société nationale de l'amiante. For the first time, a minister attempted to justify, admittedly in a most enlightening way, the granting of Crown agency status to a public corporation.[167]

As has been noted above, many public corporations have not been designated agents of the Crown either legislatively or legally. Even without this preferential treatment, they have become, as far as possible, prosperous and dynamic. In any case, such preferential treatment is not what it once was. As early as 1950, the public law regime that applied to Crown agents came under attack at the federal level. These agencies were first brought under the jurisdiction of the courts of common law, and the

necessity of obtaining prior authorization to institute legal proceedings against them was abolished. Then, in 1952, a large number of federal public corporations were required to pay federal income tax. Two years later, the immunity from the provincial tax on gasoline, retail sales and vehicle registration was abolished. In 1977, their immunity was again reduced.

A rapid review of the evolution of public law and contemporary legislation leads one to question certain privileges and immunities of public corporations. Many have already been abolished. Others, such as immunity from criminal responsibility or from the application of certain statutes, are no longer justifiable, and there is no logical reason for maintaining them.

Three categories of privileges or immunities raise important difficulties. They have been discussed recently, particularly during the debate on the bill creating the Société nationale de l'amiante.

The first of these difficulties concerns the applicability of the Bankruptcy Act. It might be considered unthinkable to force into bankruptcy a public corporation whose purpose is to serve the public; however, if its purpose were essentially commercial or industrial, it is normal to see bankruptcy as a possibility. Politically, the situation is so hypothetical that the legislature might show some generosity toward the creditors of public corporations.

The second difficulty concerns the privileges of immunity from seizure and prescription accorded property in the pubic domain that belongs to a public corporation. It would be difficult to justify abolishing imprescriptibility as long as the property is considered part of the public domain. The situation is quite different as regards immunity from seizure. I recommend that, in general, it be abolished, subject to the legislature making exceptions, for example, in the case of Hydro-Québec dams or nuclear power stations. There is no justification for a public corporation or body being immune from seizure of property in the normal course of the performance of its functions. On the contrary, the possibility of seizure may have a beneficial effect by controlling imprudent or negligent directors; it would also be fair to the creditors and there is no reason to deprive them of it.

The problem of immunity from taxation is probably the most difficult to solve. There are two aspects to this problem: the immunity of a public body from the legislation of its own level of government and immunity from the laws of the other level of government, in other words, the immunity of a provincial agency from federal tax laws and vice versa. As regards the first aspect, it would seem that immunity should be a privilege expressly conferred by law in the sense that the provincial legislation should clearly define the tax status of the large networks of public corporations. Many statutes already deal with this issue. In theory, there are few reasons for granting a privilege that is contrary to the principle of equality in taxation. However, tax immunity can be used as a tool of economic interven-

tion, as the minister of natural resources has just shown during debate on the establishment of the Société nationale de l'amiante.[168] This is no worse than allowing tax relief to private corporations or granting subsidies of any kind.

If the problem of immunity from taxation is examined from the point of view of the applicability of the tax legislation of one level of government to a public body of the other level of government, the situation is quite different. It must be realized that, as a general rule, corporations pay 75 percent of their taxes to the federal government and 25 percent to the provinces. Crown agent status confers a considerable advantage from the point of view of taxation. Of course, under the present federal legislation, this status is not necessary for obtaining immunity, since the Income Tax Act gives tax immunity to any corporation whose shares or assets are 90 percent owned by a province or a municipality. However, this advantage does not rest on any constitutional guarantee, whereas a Crown agent is protected by section 125 of the Constitution.

The question of interjurisdictional immunities, whether based on section 125 of the Constitution Act, 1867, on the common law, or on specific laws such as the income tax acts, are subject to intergovernmental constitutional negotiations. Since 1977, an effort has been made in the right direction. However, there is still much to be done, as can be seen from the issue of the payment of municipal taxes by federal Crown corporations. Early in February 1984, the Quebec Minister of Municipal Affairs once again asked Ottawa to review its position on municipal taxation.[169] Bill C-24 (1984) deals only in a very cursory manner with the delicate and complex question of the privileges and immunities of Crown corporations.[170]

There is very little that has not already been said about the controls that form the legal framework within which Crown corporations operate. Accountability has become particularly fashionable, especially since 1976. Of course Crown corporations should be accountable. But there are many ways of being accountable: some times are more favourable than others; accountability is more important for some operations and activities than for others; and there are, after all, various controllers to whom organizations are accountable.

Some reformers have tended to increase and reinforce the controls indiscriminately to the point of jeopardizing the raison d'être of a network of autonomous public corporations. A clear distinction should be made between a priori control and a posteriori control. Just as the latter should be comprehensive and thorough, a priori controls should be cautious and circumspect since they are more likely to compromise the efficiency of the corporation.

I believe that parliamentary control must be as comprehensive as possible, while being a posteriori, except for constituent acts and appropriations for certain corporations. The ongoing work of special parliamentary committees and of the Public Accounts Committee in Ottawa must be con-

solidated so that their proceedings become a forum for dialogue, discussion and exchange.

I agree with a proposal in Bill C-153 (1983), which did not appear in Bill C-24 of June 1984, to the effect that when new Crown corporations are established pursuant to the general law, they should be subject to "negative motion" in Parliament. However, when the share capital of existing corporations is acquired or disposed of, particularly on the stock market, control through negative motion would be desirable only if it were shown that the transaction was improper or contrary to the public interest. As for subsidiaries, even wholly owned subsidiaries, the rules of corporate law and securities law should apply.

Government control must be examined carefully. It is first of all through the constituent act that the government communicates the essence of the economic policy to be implemented by the Crown corporation; the mandate of such a corporation should be as precise and as comprehensive as possible to allow the performance and achievement of its objectives to be evaluated. The government must also have the power to appoint the chief executive officer and the board of directors. It must also approve the corporate plan or development plan that each Crown corporation is required to submit; in a sense, this is related to the power to issue directives that the minister requires in order that he may officially inform the corporation of the aspects of government policy that constitute its general orientation.

With respect to finance, only capital budgets should require government approval through Treasury Board. Operating budgets should be the responsibility of the corporation, except if appropriations are needed, in which case the responsible minister submits to Treasury Board the operating budget for which supplies will be voted. Only long-term borrowing should be submitted to the minister of finance. Otherwise, and especially with respect to contracts, I would favour autonomy for public corporations with rare exceptions, such as contracts involving different levels of government. To be efficient, a corporation must enjoy a large measure of autonomy and be subjected to a minimum of administrative interference.

The Auditor General's control function should be extended to all Crown corporations. He is an independent controller who has a great deal of credibility and who must report to Parliament and to the public about whether public corporations have been managed faithfully and properly. I have some reservations about whether his mandate should be extended to include what is called a comprehensive audit. If a thorough and serious internal audit, and accurate evaluation of performance and achievement of objectives in each Crown corporation were carried out, and if the information in the audit, or at least its non-confidential elements, were reported, a great deal would already have been accomplished at little expense. As to whether an external comprehensive audit can be done at

an acceptable cost in human and financial resources and whether it can fulfil the hopes of its proponents, only the results of current experiments and explorations will tell. I believe that Quebec's Bill 90 contains an acceptable compromise. Section 28 provides for the possibility of a comprehensive audit of government corporations "only with the consent of the board of directors of the corporation" (translation). The bill adds, however, that "such an audit must not have the effect of questioning the basis of the policies and objectives of the corporation's program" (translation).

I still believe that Crown corporations, in spite of the faults and deficiencies of the present system, are irreplaceable instruments for implementing certain economic policies of our governments. The system can be perfected and improved if reforms are carried out in an enlightened and careful manner.

This paper has examined the major aspects of the legal position of Crown corporations. It has suggested some reforms that will not, perhaps, put an end to the tension that has, to some extent, characterized the current state of this type of institution, which would have been seen as a hybrid by a 19th century mind but to which we have grown accustomed.

The reforms proposed in the past few years, especially those contained in Bill C-24 of June, 1984, will help to resolve certain difficulties. They also may generate others.

It seems clear that the law relating to public corporations, which is an important branch of public economic law, has not yet achieved the clarity, coherence and adaptability necessary in a liberal political system and a mixed economy. The legal and institutional position of Crown corporations will always present a challenge to students of all the disciplines concerned, including lawyers. It was well put by Lord Morrison of Lambeth in 1964:

> If we establish the public corporation, it must be for certain reasons. What are they? They are that we seek to combine the principle of public accountability, of a consciousness on the part of the undertaking that it is working for the nation and not for sectional interests, with the liveliness, initiative, and a considerable degree of the freedom of a quick-moving and progressive business enterprise. Either that is the case for the public corporation, or there is no case at all.[171]

Notes

This study is a translation of the original Franch-language text, which was completed in October 1984.

1. This was the case, for example, in 1946 with the *Atomic Energy Control Act* and the *National Research Council Act*, in 1951 with the *Defence Production Act* and in 1952 with the *St. Lawrence Seaway Authority Act*. We might also add, in some respects, the acts establishing the Export Credits Insurance Corporation (1944), the Industrial Development Bank (1945), the Canadian Commercial Corporation (1946), the Northwest Territories Power Commission (1948) and the Canadian Overseas Telecommunication Corporation (1949).

2. See on these issues: P. Garant, "L'article 7 de la Charte demeure énigmatique après 18 mois de jurisprudence" (1983), 13 *Manitoba Law Journal* 477.
3. P. Garant, *Droit administratif*, 2d ed. (Montreal: Éditions Yvon Blais 1985), p. 338 et seq.
4. See on this issue, G. LaForest, *Natural Resources and Property Rights Under the Canadian Constitution* (Toronto: University of Toronto Press, 1969), p. 148; P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977), p. 393 et seq.
5. P.W. Hogg, *supra*, n. 3, p. 395; G. Beaudouin, *Le partage des pouvoirs*, 2nd ed. (Ottawa: University of Ottawa Press, 1982), pp. 346–48.
6. (1977) 2 S.C.R. 504.
7. *Société Asbestos v. Société nationale de l'Amiante* (1981), C.A. 43, 47–50, conf. (1980) C.S. 331, 340–44.
8. *Central Potash v. Govt. of Saskatchewan* (1979), 1 S.C.R. 42; *Churchill Falls (Labrador) Corp. v. A.G. Newfoundland*, [1984], S.C.R. 297.
9. *B.C. Power Corporation v. A.G. B.C.* (1963), 47 D.L.R. 647.
10. *Canadian Indemnity v. A.G. B.C.* (1977), 2 S.C.R. 504; *Société Asbestos v. Société nationale de l'Amiante* (1981), C.A. 50, 51–52, affg. (1980) C.S. 331, 345–50; *Churchill Falls (Labrador) Corp. v. A.G. Newfoundland, supra*, note 8.
11. *Société Asbestos v. Société nationale de l'Amiante* (1981), C.A. 50, 52–56, affg. (1980) C.S. 331, 337–40.
12. *Her Majesty in Right of the Province of Alberta v. Canadian Transport Commission* (1978), 1 S.C.R. 61, 64; this case is not, however, very clear and seems to contain a contradiction.
13. S.C.R. 1970, c. A-3, s. 15.1 and 16.8.
14. Bill S-31, 1st reading, November 2, 1982.
15. Canada, Senate, Standing Committee on Legal and Constitutional Affairs, *Debates*, November 17, 1982, at p. 7.
16. *Her Majesty in Right of the Province of Alberta v. Canadian Transport Commission* (1978), 1 S.C.R. 61 at p. 69.
17. *Id.*, 61, 72; *Emerson v. Simpson* (1962), 32 O.L.R. (2d) 603; *R. v. Hamilton* (1963), 37 D.L.R. (2d) 545; *Re Sterschein* (1965), 50 D.L.R. (2d) 762.
18. This is, however, case law prior to the 1978 case: *R. (Ontario) v. Board of Transport Commissioners*, (1968) 65 D.L.R. 425; *Dominion Building Corp. v. The King* (1933) A.C. 533.
19. *Bill S-31 and the Federalism of State Capitalism*, Paper no. 18 (Kingston, Queen's University, Institute of Intergovernmental Relations, 1983), at p. 29.
20. Royal Commission on Financial Management and Accountability (Lambert Commission), *Final Report*, (Ottawa: Canadian Government Publishing Centre, 1979), p. 337 (hereafter, *Lambert Report*); Privy Council Office, *Crown Corporations: Direction, Control, Accountability* (blue paper) (Ottawa, 1977).
21. The discussion of this subject is based on an unpublished paper by Bernard Cloutier and Lionel Ouellet: "Le rôle de l'entreprise pétrolière d'Etat," June 16, 1977. There are also interesting comments on the transformation of the Post Office Department into a Crown corporation in the Commons Debates; in Quebec, see *Débats de l'Assemblée nationale*, 1983, on the creation of the *Société québécoise des transports* and the transformation of the *Ministère des Travaux publics* into the *Société immobilière du Québec*.
22. P. Garant, *supra*, note 3, p. 340 et seq.
23. Privy Council Office, *supra*, note 20, Schedule C, pp. 82–83. This network has been closely examined; see S.F. Borins, "World War II Crown Corporations: Their Functions and Their Fate," in J.R. Prichard (ed.), *Crown Corporations in Canada: The Calculus of Instrument Choice* (Toronto, Butterworth, 1983), pp. 447–75.
24. *Lambert Report*, *supra*, note 20, pp. 380–81.
25. Auditor General of Canada, *Report*, 1981–82, pp. 66–67.

26. On these issues, see P. Garant, *supra*, note 3, at p. 339.
27. *Lambert Report*, *supra*, note 20, p. 381; Auditor General of Canada, *supra*, note 25; M. Gordon, *Government in Business* (Montreal: C.D. Howe Institute, 1981), p. 212 et seq.
28. *Débats de l'Assemblée nationale*, October 10, 1978, p. 2934.
29. *Id.*, December 11, 1980, at p. B-419 (re SOQUEM).
30. *Id.*, December 1, 1981, p. 608.
31. For example, *Société de développement immobilier du Québec*, R.S.Q., c. S-11, s. 19; *Société québécoise d'assainissement des eaux*, R.S.Q., c. S-18.21, s. 33; Canadian Film Development Corporation, R.S.C. 1970 c. C-8, s. 18; Farm Credit Corporation, R.S.C. 1970 c. F-2, s. 12.
32. *Centre de recherche industrielle*, R.S.Q., c. C-8, s. 25; *Société de développement coopératif*, R.S.Q., c. S-10, s. 27.
33. *Société de développement immobilier du Québec*, R.S.Q., c. S-11, s. 19.
34. *Parc industriel du centre du Québec*, R.S.C., c. S-15, s. 30, *Société du Palais des congrès*, R.S.Q. c. S-14.1; National Harbours Board, R.S.C., c. N-8, s. 26; Canadian Commercial Corporation, R.S.C., c. C-6, s. 8; Canadian Wheat Board, R.S.C. 1970, c. C-12, s. 12; Canada Post Corporation, S.C. 1981, c. 54, s. 28; Teleglobe Canada, R.S.C. c. C-11, s. 12.
35. St. Lawrence Seaway Authority, R.S.C. c. S-1, s. 28–29.
36. Canagrex, S.C. 1980–83, c. 152, s. 15; CBC, R.S.C., 1970, c. B-11, s. 45; National Arts Centre, R.S.C. 1970, c. N-2, s. 10.
37. *Société des alcools du Québec*, authorized capital: $30 million, 300,000 shares of $100; *Loto-Québec*, authorized capital: $170,000, 1,700 shares of $100; *Hydro-Québec*, authorized capital: $5 billion, 50 million shares of $100.
38. Petro-Canada, authorized capital: $5.5 billion, common shares of $100,000; *Société québecoise du transport*, authorized capital: $75 million, common shares of $100.
39. On all of these issues, see P. Garant, *supra*, note 3, pp. 197–217.
40. *McGrane v. British Columbia Ferry Authority* (1969), 1 D.L.R. (3d) 562, 569.
41. R.S.C. 1970, c. C-38, s. 10(2); see also the *Government Companies Operation Act*, R.S.C. 1970, c. G-7, s. 2.
42. (1969) S.C.R. 60.
43. R.S.C. 1970, c. C-38, s. 28.
44. *National Harbours Board Act*, R.S.C. 1970, c. N-6, s. 39; *Canadian Commercial Corporation Act*, R.S.C. 1970, c. C-6, s. 10; see also *Langlois v. Canadian Commercial Corporation* (1950), S.C.R. 954; *Yeaty v. C.M.H.C.* (1950), S.C.R. 513.
45. (1959) S.C.R. 188, 198.
46. *Canadian Broadcasting Corporation v. The Queen* (1983), 1 S.C.R. 339, 351.
47. *Id.*, 351–52.
48. (1973) 2 O.R. 375 (Evans J.).
49. (1983) 1 S.C.R. 339, 353.
50. *Radio-Québec*, R.S.Q., c. S-11.1, s. 3; *Société de développement de la Baie James*, R.S.Q., c. D-8, s. 3; *Régie des installations olympiques*, R.S.Q., c. R-7, s. 8; *Société des alcools* du Québec, R.S.Q. c. S-13.
51. *Id.*
52. Canadian Wheat Board, R.S.C. 1970, c. C-12, s. 4(3); Cape Breton Development Corporation, R.S.C. 1970, c. C-13, s. 29(4); Federal Business Development Bank, 1970, c. F-2, s. 42(4).
53. *Minister of Justice v. Lévis* (1919), A.C. 505.
54. *Central Mortgage and Housing Corporation v. City of Quebec* (1961), B.R. 661.
55. *Reference re Proposed Federal Tax on Exported Natural Gas* (1982), 1 S.C.R. 1004.
56. *A.G. British Columbia v. A.G. Canada* (1924), A.C. 222, 225.
57. (1982) 136 D.L.R. (3d) 385.

58. Clément, *The Law of the Canadian Constitution*, cited in *Reference Re Proposed Federal Tax on Exported Natural Gas*, *supra* note 55, p. 1065.
59. *Id.*, p. 1065.
60. G. LaForest, *Allocation of Taxing Power Under the Canadian Constitution*, 2nd ed., (Toronto: Canadian Tax Foundation 1981), pp. 2–3.
61. Clément, *supra*, note 55, p. 1066; LaForest, *supra*, note 60, at p. 182.
62. Clément, *supra*, note 55, at p. 1067.
63. *A.G. British Columbia v. A.G. Canada* (1922), A.C. 22.
64. Clément, *supra*, note 55, at p. 1068.
65. *Id.*, at p. 1070.
66. *Id.*, at p. 1073.
67. *Id.*, at p. 1075.
68. S. Bale, "Reciprocal Tax Immunity in a Federation" (1983), *61 Can. Bar Rev.* 652, 662.
69. *Id.*, pp. 668–70.
70. LaForest, *supra*, note 60, at p. 184.
71. J. Chitty, *A Treatise on the Law of the Prerogative of the Crown* (London, Butterworth, 1920), at p. 327; *Halsbury's Laws of England*, 4th ed., vol. 8, para. 1446 et seq., and 971 (1983).
72. 985. A corporation, commission or association the shares, capital or property, of which are at least 90 per cent owned by Her Majesty in right of Canada or a province or by a Canadian municipality, is exempt from tax.

    The same applies to a subsidiary wholly owned corporation of such corporation, commission or association, except a subsidiary wholly owned corporation of a prescribed corporation.

    Such exemption does not apply however if another person has any right to the shares, capital or property of such corporation, commission, association or subsidiary or a right to acquire them.
73. 192. This Part applies to the exclusion of section 985 to a corporation carrying on a business as an agent of Her Majesty or of the Government, unless otherwise provided by the regulations.

    Any income or loss from a business carried on by a corporation as an agent of Her Majesty, or a property of Her Majesty administered by such a corporation shall be treated, for the purposes of the Part, as though it were an income or loss of the corporation from the business or property.

    Moreover, notwithstanding any other provision of this Part, a prescribed corporation and any corporation controlled by it is deemed not to be a private corporation.
74. *Revised Regulations of Quebec* 1981, I-3, c. R-1.
75. S.Q. 1974, c. 20.
76. R.S.C. 1970, c. C-37.
77. Air Canada
    Atomic Energy of Canada Ltd.
    Bank of Canada
    Canada Council
    Canada Deposit Insurance Corporation
    Canadian Broadcasting Corporation
    Canadian Commercial Corporation
    Canadian National Railways (as defined in the *Canadian National Railways Act* including especially the Canadian National Railway Company in respect of the management and operation of Canadian Government Railways as defined in that Act).
    Canadian National (West Indies) Steamships, Limited
    Canadian Patents and Development Ltd.
    Canadian Saltfish Corporation
    Cape Breton Development Corporation
    Canada Mortgage and Housing Corporation
    Eldorado Aviation Ltd.

Eldorado Nuclear Ltd.
Export Development Corporation
Farm Credit Corporation
Federal Business Development Bank
Federal Mortgage Exchange Corporation
Freshwater Fish Marketing Corporation
National Battlefields Commission
National Capital Commission
National Harbours Board
Northern Canada Power Commission
Northern Transportation Company Ltd.
Petro-Canada
Royal Canadian Mint
Teleglobe Canada
The Canadian Wheat Board
The St. Lawrence Seaway Authority
The Seaway International Bridge Corporation Ltd.

78. R.S.Q., c. F-2.1, s. 204: "The following are exempt from all municipal or school real estate taxes: 1. an immoveable belonging to the Crown in right of Quebec, unless it is administered or managed by a corporation that is a mandatary of the latter."
79. *Id.*
80. R.S.Q., c. H-5, s. 40.
81. R.S.Q., c. F-2.1, s. 204(1): "an immoveable belonging to the Crown in right of Canada or to a mandatary of the latter."
82. See, for example: Federal Business Development Bank, S.C. 1974, c. 14, s. 43; Petro-Canada, S.C. 1975, c. 6, s. 15(1); CN, R.S.C. c. C-10, s. 15.
83. R.S.C. 1970, c. M-15, s. 2(e).
84. *Débats de l'Assemblée nationale*, June 22, 1983, at p. 2886.
85. *House of Commons Debates*, December 3, 1979, at p. 1957 (Mr. Crosbie).
86. *Id.*, at p. 1958.
87. *Débats de l'Assemblée nationale*, June 22, 1983, at p. 2882.
88. *Re Silver Brothers* (1932), A.C. 514; *Dominion Building Corp. v. The King* (1933), A.C. 533; *R. v. Murray* (1967), S.C.R. 262.
89. *Supra*, n. 88; also *A.G. Quebec v. Bank of Montreal* (1979), 1 S.C.R. 565, 574.
90. *R. v. Murray* (1967), S.C.R. 262; *Alberta v. Canadian Transport Commission* (1978), 1 S.C.R. 61, 72.
91. *Province of Bombay v. City of Bombay* (1947), A.C. 58, 62–63; cited in *Alberta v. Canadian Transport Commission* (1978), 1 S.C.R. 61, 69.
92. R.S.C. 1952, c. 158, s. 16.
93. S.C. 1967–68, c. 67, s. 16.
94. (1978) 1 S.C.R. 61, 75.
95. *Gauthier v. The King* (1917), 56 S.C.R. 176; *A.G. Canada v. Keable* (1978), C.A. 44, 50, affd. (1979) S.C.R. 218, 244.
96. (1978) 1 S.C.R. 61, 72.
97. *Id.*, at p. 71.
98. *Id.* pp. 61, 69.
99. *Sparling v. Caisse de dépôt et placement du Québec*, Jurisprudence Expresse, no. 82–992 (C.S. Montreal, November 8, 1982).
100. *A.G. Canada v. Uranium Canada Limited* (1984), 4 D.L.R. (4th) 193 (S.C.C.) affg. (1982) 39 O.R. (2d) 475 (Ont. C.A.). Since this decision, a bill has been tabled to make this act expressly applicable to Crown agents (Bill C-29, April 2, 1984).
101. *Freshwater Fish Marketing Corp. v. Duchominsky* (1982), 19 Man. R. (2d) 358; 1983 3 W.W.R. 83; also *Villiard v. Commission de protection du territoire agricole du Québec*, Jurisprudence Expresse no. 82–682 (C.S. Quebec, June 1, 1982).

102. *Interpretation Act*, S.B.C. 1974, c. 42, s. 13.
103. P. Garant, *supra*, n. 3, pp. 55–57; these priorities have been interpreted in a very restrictive manner with respect to Crown corporations: *B.C. Power Corp. v. A.G. B.C. and B.C. Electric* (1962), 34 D.L.R. (2d) 25 (B.C.C.A.).
104. R.S.C. 1970, c. E-10, s. 36.1 to 36.3, as amended by S.C. 1981–82, c. 111, s. 4.
105. *Bankruptcy Act*, R.S.C. 1970, c. B-3.
106. Albert Bohémier, *La faillite en droit constitutionnel canadien* (Montreal: Presses de l'Université de Montréal, 1972), p. 60 et seq.
107. *Id.*, pp. 61–62. He justified his argumentation as follows: the *Bankruptcy Act* is basically a private law measure which, in England and elsewhere in the West, has been applied only to individuals and private corporations. Such legislation would usually come under provincial jurisdiction (property and civil rights): "It seems, therefore, more logical to argue that (. . .) the federal Parliament only has jurisdiction over private law, that is, over that part of civil rights which shapes the law of bankruptcy." He then cites a 1983 decision and concludes that, if this is correct, it follows that the federal Act cannot, by definition, apply to a provincial public institution.
108. See on this issue, the recent Supreme Court decision in *Robinson v. Countrywide Factors Ltd.* (1978), 1 S.C.R. 753, especially the reasons of Pigeon J. and Beetz, J. as well as the large body of constitutional case law with respect to legislative inoperability.
109. *In re: Spartan Air Services Ltd.* (1961), 1 C.B.R. (n.s.) 33 and 149.
110. *Formea Chemicals v. Polymer Corp.* (1968), S.C.R. 754.
111. S.C. 1982–83, c. 111, s. 14–15.
112. R.S.Q., c. A-2.1.
113. On these issues, see especially J.R. Prichard, *supra*, note 23.
114. For the legal and political significance of this concept, see P. Garant, *supra*, note 3, chap. 1.
115. "It will play a role which is absolutely essential to give financial support to the economic progress of Quebec in conjunction with the large corporations which have been set up in the past few years." Jean Lesage, *Débats de l'Assemblée législative*, June 9, 1965, p. 3332 et seq.
116. R.S.C. 1970, c. B-11, s. 3.
117. S.C. 1980–83, c. 152, s. 14(1).
118. R.S.C. 1970, c. E-8, s. 10.
119. S.C. 1975, c. 61, s. 6.
120. Raymond Garneau, "*Les Entreprises d'Etat*," speech presented to the *Société des comptables en administration industrielle*, Quebec, January 10, 1972. See also, Yvon Bérubé, *Ministre de l'Energie et des Ressources, Débats de l'Assemblée nationale*, December 8, 1980, at p. B-54.
121. *Roncarelli v. Duplessis*, 1959 S.C.R. 120; *P.P.G. Industries v. A.G. Canada* (1976), 2 S.C.R. 739, 742; *Township of Innisfil v. Township of Vespra* (1981), 2 S.C.R. 145. See P. Garant, *supra*, note 3, p. 151 et seq.
122. See P. Garant, *La Régie des marchés agricoles: organisme de régulation économique et tribunal administratif* (Quebec: Laval University, Faculty of Law, October 1981), p. 218 et seq.
123. Considerable study has been devoted to this issue; see P. Kenniff, D. Carrier, P. Garant and D. Lemieux, *Le contrôle politique des tribunaux administratifs* (Quebec: Presses de l'Université Laval, 1978); see also publications of the Law Reform Commission of Canada, the Economic Council of Canada, the Peterson Committee, the Royal Commission on Financial Management and Accountability.
124. M. Gordon, *Government in Business* (Montreal: C.D. Howe Institute, 1981). pp. 219–22.
125. *Lambert Report*, *supra*, note 20, at p. 387.
126. *Id.*, at p. 388.
127. R.S.C. 1970, c. C-11, s. 17.
128. S.C. 1983, c. 152, s. 36–37.

129. J.R. Prichard, *supra*, note 23, at p. 81.

130. Allan Tupper and G. Bruce Doern, *Public Corporations and Public Policy in Canada* (Montreal: Institute for Research on Public Policy, 1981), at p. 40.

131. In this case and in that of SPICAM (Mirabel), the budget must also be submitted to the appropriate federal minister.

132. J.R. Prichard, "Reforming Crown Corporations," lecture presented at the conference "The Board of Directors: Coping with Changing Expectations," Conference Board of Canada, Toronto, November 29 to December 1, 1983.

133. R.S.C., c. B-11, s. 41.

134. R.S.Q., c. S-13, s. 20 (this is the 1983 version, but the previous version was much more restrictive).

135. At present, this power is provided for in the following acts: Canada Post Corporation; Air Canada; Canadian Commercial Corporation; Teleglobe Canada, Petro-Canada, National Harbours Board; Canada Mortgage and Housing Corporation.

136. *Report of the Air Canada Inquiry*, Mr. Justice W.Z. Estey (Ottawa: Information Canada, 1975), no. 203.

137. *Lambert Report*, *supra*, note 20, at p. 384.

138. Tupper and Doern, *supra*, note 130, at p. 39.

139. Prichard, *supra*, note 23, at p. 83.

140. Tupper and Doern, *supra*, note 130, at p. 39. Prichard, *supra*, note 23, at p. 83.

141. *Blue paper, supra*, note 20, pp. 26–27.

142. *Débats de l'Assemblée nationale, Comité des régies à caractère industriel et commercial,* 1965, at p. 5. The number of members increased from 15 at the beginning to 22 in 1968, the last year of the committee's existence (*Débats*, 1968, at p. 30).

143. *Débats*, 1968, at p. 5.

144. *Débats*, October 30 and 31, 1968, pp. B-315 to 397;
Débats, November 6, 7, 8, 1968, pp. D-405 to 441;
Débats, November 12 and 13, 1968, pp. B-471 to 503;
Débats, November 20, 1968, pp. B-519 to 544.

145. Statement by Marcel Masse, *Ministre d'Etat délégué à la Fonction publique*, *Débats de l'Assemblée nationale, Comité des régus à caractère industriel et commercial*, at p. B-319.

146. The *James Bay Region Development Act*, first reading June 23, 1971, received Royal Assent July 14, 1971 (S.Q. 1971, c. 34).

147. *Débats*, 1978, pp. B-8255–8280; also, pp. 2810–2823 and 2983–2994.

148. On the role of the *Commission Parlementaire de l'Energie et des ressources*, see the author's articles on: "*Le rôle de l'Etat . . .*" and "*Les techniques actuelles de contrôles démocratiques . . .*" (1983) 24 *Les Cahiers de Droit* 4, 759–82 and 795–830.

149. *Débats, Commissions des richesses naturelles*, 1978, pp. B-453–2569; this was one of the longest debates in our parliamentary history on such an issue.

150. *Débats, Commission de l'industrie, du commerce et du tourisme*, November 28, 1979, p. B-10803–43 (objectives and orientation of the S.G.F.) and June 6, 1979, B-4895–4958 (program for recovery of Marine Industries Ltd.); *Débats*, May 1, 1977, at p. 927 (SOQUIA directives).

151. *Lambert Report*, *supra*, note 20, at p. 382 et seq.

152. In British Columbia the parliamentary committee was established by virtue of the *Crown Corporation Reporting Act*, S.B.C. 1977, c. 49; in Saskatchewan, the committee has existed since 1940.

153. Motion tabled by Claude Forget (Liberal) on Sept. 22, 1981, *Débats de l'Assemblée nationale*, 1981, p. B-939 et seq.

154. The reform was announced by the Speaker of the *Assemblée nationale* on June 22, 1983; *Débats de l'Assemblée nationale*, at p. 2889. The new *Règlement de l'Assemblée nationale* was passed in the spring of 1984.

155. This idea is broader here because it includes various government agencies of an administrative nature; see *Rapport 1981*, p. 95 et seq.

156. *Rapport 1983*, pp. 113–16.

157. *Rapport 1981*, pp. 3–8; also *Débats de l'Assemblée nationale, Comité des finances et des comptes publics*, September 22, 1981, p. B-960 et seq; Bill 90 of June, 1984.

158. *Débats de l'Assemblée nationale, Comité des finances et des comptes publics*, September 22, 1981, p. 960 et seq.

159. See in this regard: Independent Review Committee on the Functions of the Auditor General of Canada, *Report*, Ottawa, March 1975; J.J. Kelley and H.R. Hanson, *The Public Accounts Committee and the Legislative Audit* (Ottawa, The Canadian Foundation for Comprehensive Auditing, 1981).

160. *Rapport 1981–82*, pp. 87–89.

161. *Rapport 1983*, at p. 109.

162. See *Comité des comptes publics, Procès-verbaux et témoignages*, fascicule no. 67, February, 1983.

163. *Churchill Falls (Labrador) Corp. v. A.G. Newfoundland*, Supreme Court, supra, note 8.

164. *Central Canada Potash v. Government of Saskatchewan* (1979), 1 S.C.R. 42, 76 (Laskin C.J.).

165. One wonders what, in 1983, justified the obscure creation of a new *Société canadienne des paris sportifs*.

166. R.P. Barbe, "Les entreprises publiques mandataires de Sa Majesté," (1964–65) *Justinien*, pp. 61–85. And in several decisions, certain judges, especially Lord Denning in 1950, have expressed the same opinion: *Tamlin v. Hannaford* (1950), 1 K.B. 18, 251, or Jones J. of the Nova Scotia Court of Appeal in *Sydney Steel Corp. v. Al E. and C. Ltd.* (1983), 148 D.L.R. (3d) 348, 352.

167. *Débats de l'Assemblée nationale, 1^er^ mai, Commission des richesses naturelles 1978*, p. B-2044–2054 (Yves Bérubé).

168. *Débats de l'Assemblée nationale, 26 avril, Commission des richesses naturelles*, 1978, p. B-1789 et seq.

169. *Le Soleil* (Quebec), February 4, 1984, p. B-4.

170. The opposition maintained on June 28, 1984, that this issue had not even been brought up: *House of Commons Debates*, June 28, 1984, at p. 5290.

171. Lord Morrison of Lambeth, *Government and Parliament* (London: Oxford University Press, 1964), p. 292.

2

Understanding Regulation by Regulations

RODERICK A. MACDONALD

Introduction

For many, the accelerating growth of government has been the most prominent feature of the postwar Canadian political landscape. But it is not only the increasing share of GNP consumed by the state that has attracted attention. Observers have also been concerned with what they perceive to be an undue expansion of governmental regulatory activity. In particular, the apparent addiction to delegated legislation (regulations)[1] as a vehicle for pursuing public policy goals has come under scrutiny.

This paper takes as its point of entry into issues of governmental regulation an assessment of regulation by regulations since 1945. The first part opens with a capsule description of patterns of visible regulatory activity since World War II. It then briefly reviews one or two contemporary perspectives on regulation advanced by political scientists and economists.

The second part examines delegated legislation (regulations) from a legal point of view. Both parliamentary and judicial control of these subordinate statutory instruments are assessed, and modern legislative responses to the proliferation of regulations are analyzed.

The paper next considers the problem of regulation from a broader perspective, and elaborates a model of regulatory institutions, processes and sanctions. In this third part, certain currently popular conceptions of the regulatory enterprise are criticized. This critique is grounded in contemporary approaches to legal and social theory and builds on recent studies of compliance in administrative law.

Part four is an account of why regulation by regulations has become a favoured strategy of governments in postwar Canada. Various assumptions about the state, the law, and legislative language are explored, with a view to showing how ideological factors shape not only the decision to regulate

through centralized governmental authority but also the choice of any given regulatory instrument.

The future of regulation is addressed in the fifth part, which sets out a framework for understanding the growth of government in general. Recurrent themes such as deregulation, limited-term regulatory programs, freedom of information and privatization are then situated in their legal context. This part also speculates on alternatives to regulation, assesses the problem of private power, and considers anew the problem of defining regulation.

It is to be emphasized that this is not simply a study of regulation by regulations. It is an essay about law and government which is intended to offer (and justify) a view of both that is different from that tacitly accepted by most Canadian legal and political theorists. Of course, in keeping with the Royal Commission's mandate the study does have a pragmatic objective: to reorient debate about regulation so that public policy choices are not predetermined by an assumed analytical framework that ignores certain options and forecloses others. The essay's more important didactic purpose, however, is to suggest the important contributions to legal theory that can arise from a careful study of Canada's unique socio-political traditions.

Perspectives on Regulatory Growth

Studying regulation has become a predilection of lawyers, political scientists and economists.[2] Unfortunately, they do not often agree on the meaning of the term "regulation". Legal commentators typically limit their analyses (if not their theoretical framework) to the juridical instrument of that name, regulations. Economists and political scientists often will take a somewhat broader view, although they too are preoccupied by certain highly visible legal devices: most often, regulation is seen as the use of legislative instruments to impose "command and control" behavioural constraints. In short, all commentators apparently adopt a conception of regulation that excludes many of the activities of government.

Visible Regulation in Canada Since World War II

There is no shortage of material outlining the growth of government since Confederation and especially since World War II.[3] Commentators generally have sought evidence of regulation in statutes and in delegated legislation. Tabulating the volume of parliamentary material, it is thought, will provide a true picture of governmental growth and the scope of regulatory activity. Of course, this mass of legislation has no uniform content or objective. Some statutes characterized as regulatory will impose

normative requirements directly, or will establish tribunals or agencies and delegate discretionary powers to them. Others will authorize inquiries, or set up investigatory and recommendatory bodies or royal commissions. Certain statutes may impose tax burdens or grant subsidies, while others will create Crown proprietary corporations. Yet in each case, the effect of the statute, no matter how hard it is to measure substantively, is visible.

It is worth noting here, since the point is frequently overlooked, that few forms of state activity are of recent vintage.[4] Although the highly specialized, semi-independent regulatory agency appears to be a creature of the postwar period, its antecedents in Britain are easily traced to Renaissance institutions such as the Court of Star Chamber, local governments and sewage tribunals. What is more, by 1870 the notion that government should provide the legal framework for the marketplace by means of what are now known as regulatory statutes was widely accepted. The delegation of broad discretionary power to individuals, such as magistrates, poverty commissioners and tax collectors, also was a frequently used tool of 19th-century public administration. Again, the use of detailed statutory instruments to flesh out the general terms of enabling legislation, although a legislative technique that has been prevalent in the 20th century, is not unique to it; by the time of Confederation, delegated legislation already occupied a significant place in Canadian law. Finally, even the Crown proprietary corporation cannot be said to be a latecomer to the scene; while the form of Crown ownership may have changed, as in the case of the Post Office, it simply reflects parallel changes in the law of property and business associations.

Modern research studies invariably conclude that the volume of regulatory statutes and delegated legislative instruments has increased dramatically since the 19th century. They also report that administrative agencies, boards and commissions operating outside the framework of the centralized civil service have proliferated at all levels, and that the gross number of discretionary powers delegated to them has increased considerably. The same can be said for other governmental institutions, such as Crown corporations. Not surprisingly, recent statistics suggest that an especially rapid growth has occurred in all the foregoing over the past fifteen years.[5]

Undoubtedly, such quantitative studies are useful in cataloguing certain patterns of governmental initiative. But the amount of state regulation is not strictly a function of formal (and visible) manifestations of regulatory activity. The scope of informal (and generally invisible) regulation must also be evaluated; a model for doing so will be set out in the third part of the study. Moreover, both formal and informal inputs into the economic environment are no more than presumptive indicators of the extent of regulation. The true measure of state activity must be its impact on the behaviour of citizens and corporations. It follows that any substantive theses about the growth of regulation (and whether we have too much

of it) can be formulated only after output data have been examined: one must assess whether a given regulatory initiative has any real effect. This matter will be taken up later.

For the present, however, it is unneccessary to explore these issues. Statistics about the use of the formal instruments of government provide a sufficient base upon which a preliminary analysis of regulation by regulations may be built. They demonstrate, at the very least, an increased propensity in recent years to employ delegated legislation to implement state policy objectives. These statistics enable us to consider various rationales for visible regulatory activity. Since political scientists and economists have been among the most persistent critics of the Canadian regulatory system, and since both typically focus on visible instruments, a review of their conceptions of regulation should help us assess the scope and processes of regulation from a legal point of view.

The Politics of Regulation: Political Rationality

Of the variety of political science perspectives on regulation, only the model of political rationality will be examined in this section.[6] The special merit of this model (and the reason for considering it here) is that it offers an insight into the question of why visible policy intruments, and in particular the regulatory statute, are so attractive to governments.

According to political rationality theorists, regulation is no different from any other manifestation of public policy. It can be understood as a political commodity, to be deployed for maximum electoral benefit. The model posits that the prime concern of the modern regulator in the political arena is the impact that proposed regulatory action will have on the voting intentions of marginal electors (swing voters) as opposed to infra-marginal groups (either non-voters or committed voters). In each case, coalitions of interest groups will define whether voting marginality is present and therefore will often play a determinative role.

It follows that the selection of regulatory policy will be shaped by the potential distribution and concentration of benefit and cost of each instrument, as well as the appearance of such distribution and concentration. The regulator will attempt to transfer as much benefit as possible to marginal voters (members of the dominant coalition) and as much cost as possible to infra-marginal voters (unorganized interests), on the assumption that the former will recognize the proffered advantage and be influenced by it.

Because of limitations on the amount of information that voters have at their disposal, benefits will also be concentrated so that their sheer size will enhance their visibility. Concomitantly, costs must be distributed as diffusely as possible among unorganized interests in order to prevent

recognition of the burden being transferred. What is more, both marginal and infra-marginal voters can be influenced by subsidized, selective information that exaggerates benefits and depreciates costs. In other words, it is unnecessary for a proposed regulatory initiative actually to have a politically beneficial economic or social effect (by transferring benefits from infra-marginal voters to marginal voters) as long as it is perceived to have one.

So, for many political scientists, the management of voter reaction assumes a controlling function in regulatory policy. If this model is valid, it is obvious why the most visible forms of regulation are to be preferred. Indeed, visible instruments will publicize regulatory policies cheaply and clearly, thereby reducing the costs of informing marginal voters. Moreover, the deployment of visible forms to express policy choices often permits perceived benefits to be much greater than real benefits, and perceived costs to be lower than real costs.

The model of political rationality also suggests why an ordering of instruments may be indicated between various forms of visible state initiative. Intervention by "command and control" instruments — direct or delegated legislation establishing behavioural norms — frequently will have political advantages over other regulatory tools such as subsidy, taxation and public ownership. For example, the symbolic effect of legislation may be dissociated more easily from its actual effect: the underinformed marginal voter, who typically believes in a congruence of the law in books and the law in practice, often will not inquire whether a given program is actually effective; by contrast, the infra-marginal voter, who theoretically bears the redistributional costs of regulation, usually has sufficient information to realize when underenforcement is protecting his or her interests.[7]

A like calculus may also influence the shape of individual regulatory statutes. Thus, broad prohibition, complemented by a plethora of detail in delegated legislation, may facilitate more moderate enforcement through loopholes and exemptions. Again, legislative overinclusiveness may be tempered by insufficient resource allocation to enforcement agencies. Finally, political expediency may require instruments that are flexible and even reversible; hence, relatively general policy directions, complemented by variable specific requirements, provide advantages not available if state ownership, marketable property rights, and changes in liability rules are deployed as regulatory vehicles.

Of course, there has been no reference here to the many nuances of the political rationality model. Moreover, political scientists advance a wide variety of other models of the regulatory process — ranging from the behavioural to the structural/functional. Nevertheless, the model is unsurpassed as a means of explaining governmental preferences for visible instruments, and especially for the regulatory statute. This perspective is appropriate, too, because it adopts the underlying conception of regulation

shared by almost all political scientists; namely, that regulation encompasses that subset of overt state economic activity that is characterized principally by the imposition of normative requirements, backed by penalties.

Regulation and Economic Theory: Market Efficiency

When the regulatory enterprise is examined from an economic perspective, a slightly different picture emerges. While most non-Marxist economists agree with political scientists that regulation encompasses only command and control instruments,[8] many (particularly those who advocate deregulation) also claim a limited typology of regulatory modes. Regulation may be direct (or economic), where government controls price, rate of return, output, market entry or market exit; or regulation may be indirect (or social), where government controls attributes of a good or service, methods of production, contractual conditions, or information disclosure.

It follows that, for most economists, taxation, direct subsidy, inquiry, liability rules, marketable property rights and proprietorship — although they are elements in a government's arsenal of economic levers and are frequently visible — are not, analytically, regulation. What is more, the standard "welfare economics" approach contemplates only three broad rationales for regulation: improving economic efficiency by compensating for market failures; redistributing wealth and income; and pursuing social or cultural objectives.[9]

A primary corollary of this current in economic thinking is that the correction of market failures is the only internally legitimate criterion of regulation. Redistributional, social or cultural objectives justify the deployment of the "command and control" regulatory vehicle only where other government policies are less efficient instruments for achieving a purpose that itself is economically inefficient. While the major assumptions of this corollary — that there can be such a thing as an efficient, self-regulating market economy, and that markets are a social institution with a legitimacy equal to that of the political state — will not be evaluated immediately, it is important to note the agenda they serve. Appropriate state conduct in the regulatory mode ought to be measured solely by a standard of economic efficiency: ethics are market economics.[10]

The concept of market failure usually is held to comprise five distinct aspects.[11] These are the natural monopoly (where an industry can remain efficient only if there is one producer); destructive competition (where the industry is inherently so competitive that it must be stabilized through regulation); externalities/spillovers (where the social costs provoked by private activity exceed reasonable levels or can be excluded from production costs); inadequate provision of information (where one contracting party lacks sufficient information to make an efficient market choice); and

improper use of common natural resources (where exploitation by one or a few individuals may amount to expropriation of the interests of others or to inefficient use of the resource).

Redistribution of income usually is not seen as an economically legitimate regulatory criterion. Necessarily, it is argued, non-market redistribution of income must be inefficient. Such redistribution occurs in the creation (or nurturing) of monopolies (often through the imposition of barriers to market entry), in the protection of designated industries from abrupt economic changes (through subsidy, tax relief, tariff barriers and the like), and in the particular benefits afforded to certain customer groups of regulated industries (via rate fixing, compulsory service, cross-subsidization and profit expropriation).

Similarly, social and cultural objectives are also viewed as inappropriate goals to be pursued by the regulatory vehicle. In Canada, most examples of social and cultural regulation may be found in the natural resources, energy, health care, transportation, communications and, recently, hi-tech industries. Favoured regulatory instruments include the establishment of tariffs, the control of foreign ownership, price fixing, and, of course, content requirements in broadcasting, employment, marketing and raw materials.

While most market economists are prepared to acknowledge that the objectives of some of these non-market regulatory initiatives might be worth pursuing for political reasons, they also claim that the true cost of state activity should be calculated, and that alternatives, such as subsidy, taxation, and changes to liability rules, should be deployed whenever they can be shown to be more efficient. In other words, "command and control" state regulatory activity is, in principle, justified only on the grounds of efficiency.

By and large, the above account reflects present-day western economic thinking about regulation. Recently, however, some market economists have presented a more radical argument. They assert that non-market regulation is always inappropriate and that even most regulation now ostensibly justified as a corrective to market failure is illegitimate. For adherents of this view, the primary objective of the modern regulatory statute is disguised industry protectionism through barriers to market entry. These barriers entrench existing market shares by artificially piggybacking on fears of market failure (as in the airline industry), on cultural values (as in broadcasting policy) and on political aspirations (as in the National Energy Program). At bottom, the claim is that any disruption of market allocation generates economic costs exceeding those arising from market distortion, or even from perceived market failure itself.[12]

Of course, the preceding paragraphs do not purport to offer a comprehensive summary of current economic thinking about regulation. Rather, they are intended to bring to light the assumptions of welfare economists

who argue the case for deregulation. As in the case of most political science models, the archetypal economic models presuppose that regulation comprisesonly visible "command and control" instruments.

Assessing Current Political and Economic Models

The perspectives of political rationality theorists and market economists, as applied to the raw data about the proliferation of primary and delegated legislation, lend plausibility to recent complaints that Canadian society is overregulated — at least in the sense of there being too many regulatory statutes and regulations. But, by implication, these perspectives also reveal that assessing governmental growth and regulatory activity is a complex undertaking. For example, even critics are not in agreement about why or when governments should regulate.

What is more, contemporary political and economic theorists often leave unargued the most basic question of all: What is regulation? For them, regulation is not synonymous with governmental economic initiative, but rather is assumed to be a subset of such initiative, to be contrasted with taxation, subsidy, nationalization, and changes to liability rules. The third part of this study will investigate whether the conception of regulation sustaining these political science and economic models is analytically sound.

Once the question of what exactly constitutes regulation has been addressed, two further themes may be considered. The first is the substantive question of whether state initiative through regulation is justified. Here one is required to develop a theory about the role of the modern state and its relationship to the economy. Such a theory invites a consideration of whether government economic activity should be limited to correcting market failure; whether it should also encompass the allocation and redistribution of political and economic goods; or whether it should even extend to the promotion of social and cultural objectives. Moreover,the theory also raises the question of whether the state should regulate even in such a way as to enhance market efficiency by creating new institutions of economic exchange.

As these issues are examined, a second theme — the choice of regulatory instrument — must also be considered. Here, one is invited to decide whether the criterion for evaluating competing instruments should be economic (e.g., should one always choose the instrument most economically efficient); political (e.g., should one always choose the instrument that maximizes visible marginal voter benefit and minimizes visible infra-marginal voter detriment); ethical (e.g., should one always choose the instrument that can be justified according to some philosophical conception of man and the state); or even some other criterion. The two themes, of course, are intimately connected, for the problem of means bears on the problem of goals: a desire to regulate may be frustrated by the inappropriateness

of any available regulatory vehicle, and an unyielding commitment to a particular instrument may preclude the attainment of a desired regulatory goal.

The fourth part of this study is intended to explain why certain regulatory instruments have been so favoured in Canada. The two further issues raised above are examined thereafter. By way of anticipation, it may be noted that exclusive attention to highly visible governmental manoeuvres (reserving uniquely to these the epithet "regulatory") provides an incomplete picture of state economic activity. Nevertheless, because the regulatory statute and its companion, delegated legislation, seem to have been deployed zealously in recent decades, it is appropriate to assess their legal nature before reconstructing a more general theory of the regulatory enterprise.

A Legal Analysis of Delegated Legislation as a Regulatory Vehicle

A proper legal analysis of delegated legislation demands, as a preliminary, an evaluation of the statutory form as an instrument of regulation. Once a government has decided on a given initiative and Parliament has consented to the deployment of legislation (i.e., formally enacted rules of duty and entitlement)[13] mechanism for pursuing the regulatory goal, the policy maker confronts an important choice: should the legislation regulate directly, or should some aspect of the regulatory endeavour be delegated to a specialized agency?

Direct regulation involves the announcement of regulatory policy and norms by statute, their enforcement by the executive, and the adjudication of interpretational disputes by the courts. Delegated regulation involves the assignment of any one or more of these functions to other parties, whether public (officials within the civil service, semi-independent regulatory agencies, the cabinet, the courts, Crown corporations, municipalities), semi-public ("self-regulating" professions, proprietary marketing boards, recognized trade unions), or even private (the beneficiaries of a protected legal regime, such as banks, the claimants of social largesse or subsidies, or the recipients of statutory entitlements, for example, doctors and hospitals).

When the decision is made to regulate directly, a further choice has to be made. At what level of generality should the legislative rule be cast? Presumably, Parliament could always enact statutes with a very precise normative content, such as the Income Tax Act. In these cases, little additional specification of legislative intent is necessary, and little scope for creative policy development is left, in theory, to the enforcement agency or the courts. By contrast, Parliament might choose to enact legislation in more general terms (the Criminal Code) or in very general terms (the property sections of the Ontario Family Law Reform Act), either leaving

a wide latitude to the courts and the enforcement agency to implement the policy through case-by-case development, or permitting the enforcement agency to develop its own internal policy rules and guidelines.

Similar options are available in all cases of delegated regulation. The specialized body that has to make decisions may be confronted with very detailed statutory rules relating to both entitlements and enforcement, as in the case of a great deal of legislation to do with labour standards and landlord/tenant relations. Alternatively, the statutory delegate may be given very general guidelines by statute and be authorized to develop policy either by promulgating formal rules and regulations, announcing informal guidelines and rules of interpretation, or deciding disputes on a case-by-case basis. Most provincial securities commissions exercise a mandate of this latter type. Finally, the delegate may be confronted with a general statute that is completed in detail by Parliament itself through delegated legislation (e.g., umpires under the Unemployment Insurance Act) and must master an enormous mass of delegated legislation.

It follows that the decision to have recourse to delegated legislation in any particular case is to a large degree an independent variable in the regulatory calculus. It is not contingent upon Parliament's decision about whether direct or delegated regulation is preferable. It is also relatively unaffected by any conclusions Parliament may reach as to the optimal precision of the legislative rules to be announced. More importantly, recourse to formally enacted delegated legislation is not conditioned solely by the decision that general legislative rules, rather than case-by-case development, should be employed in policy elaboration. On the one hand, legislative rules are just as easily promulgated through informal guidelines, policy statements, directives and interpretation bulletins as by formal delegated legislation; on the other hand, there is no reason why delegated legislation cannot be used to formalize essentially adjudicative decisions taken in individual cases.

One might conclude this introductory summary by noting that delegated legislation is only one item in Parliament's legislative warehouse and that few substantive considerations limit its availability as a regulatory tool.

The Nature of Delegated Legislation

Legislative and judicial definitions of delegated legislation abound in Canada. Every province except Quebec has a statutory definition of a regulation, and these are not always congruent. Moreover, the federal Parliament has itself contributed three concurrent statutory definitions.[14] In principle, these legislative definitions are intended to identify the class or classes of instrument to which certain formal requirements respecting registration and publication will apply.

However, the problem of definition is complicated because courts have on various occasions held that certain subordinate instruments of a legis-

lative character do not fall within the relevant statutory definition. Thus, rules and directives of the Commissioner of Penitentiaries, standing orders of the Commissioner of the RCMP, ministerial directives, budgetary guidelines, government policy statements, policy statements issued by regulatory agencies, "interpretation bulletins" and "information circulars" under the Income Tax Act, statements of administrative policy and long-standing practice, civil service selection standards, manuals and policy guidebooks, internal organizational rules and by-laws of private statutory associations — all have been found not to be delegated legislation.[15]

In view of this plethora of definition and interpretation, any attempt to capture the essence of the term "a regulation" can only be an approximation. Nevertheless, commentators generally follow the description set out in the MacGuigan Committee Report:

> . . . a regulation is a rule of conduct, enacted by a regulation making authority pursuant to an Act of Parliament, which has the force of law for an undetermined number of persons.[16]

In other words, a regulation has three functional characteristics: in origin, it is typically authorized by statute; in content, it has a general, normative scope; and in its effect, it has the force of law.

To say that regulations must be statutorily authorized means that their scope is controlled by the primary statute.[17] Unless the enabling statute permits it, a regulation may not modify primary legislation, nor define terms in such statutes, nor incorporate other standards by reference, nor subdelegate any powers conferred, nor purport to deal with any subject not specifically enumerated in the delegating section of the enabling statute. While some of these propositions have been the subject of controversy in the past (especially where formulae pretending to overcome the subordinate nature of delegated legislation, such as the "as if enacted" clause, were at issue), today these limitations are generally accepted. Other consequences of the subordinate character of delegated legislation will be considered when judicial review doctrines are analyzed.

To say that delegated legislation has the force of law implies that regulations are legally binding.[18] Until a regulation has been found to be *ultra vires*, it produces the same legal consequences and is subject to the same legal restraints as a statute. Hence, doctrines of judicial notice, non-applicability to the Crown, and the impossibility of dispensing with regulations in particular cases, will govern delegated legislation. Moreover, in certain jurisdictions regulations, as law, must be enacted bilingually.

For present purposes, the most important feature of delegated legislation is that it is normative: the fact that regulations establish rights and obligations that, in principle, have general application. While very narrowly cast statutory instruments may still be regulations, there are several distinct aspects of normativeness that have been judicially recognized.[19] A power to make regulations cannot be transformed into a power to decide individual

cases on an "equitable" or ad hoc basis. Nor may it justify the total prohibition of an activity or the enactment of imprecise, discriminatory or retroactive rules. Similarly, a subdelegation of power, through simple repetition in the regulation of the terms of the primary legislation, is offensive to the concept of normativeness, since no standards have been established.

These three attributes of delegated legislation are helpful in elaborating formal and substantive limitations on the scope of this legal device. Yet, each amounts to no more than an after-the-fact characterization and does not really serve to limit the range of legislative-type instruments that may be promulgated under a statute. For example, many statutory instruments simply do not meet the requirements of either legislative or judicial definitions, even though their legal effect is undeniable.[20] In other words, the major policy issue relating to delegated legislation is not the specific requirements that must be followed once an instrument is classified as a regulation. The criteria of classification and the proliferation of informal delegated legislation pose the major theoretical difficulties for the legal regime of delegated legislation.

Justifications for and Concerns about Delegated Legislation

The principal justifications for delegated legislation have been put forward in a number of studies, of which the following extract from the MacGuigan Committee is representative:

> The reasons usually given to justify the delegation by Parliament of the power to make laws are: lack of Parliamentary time; lack of Parliamentary knowledge on technical matters; the necessity of rapid decisions in cases of emergency; the need to experiment with legislation, especially in a new field; the need for flexibility in the application of laws; and unforeseen contingencies which may arise during the introduction of new and complex pieces of legislation.[21]

At the level of political theory, the major rationale for regulation is simply that Parliament should devote its time to thorough debate about, and careful formulation of, the policy objectives it wishes to pursue through legislation. Indeed, given the nature of the parliamentary process, it would be impractical to require debate about questions of detail, which can be resolved better in less formal and more informed contexts. Of course, for reasons of historical importance, the Income Tax Act and the Criminal Code remain notable exceptions to this general view.

Lack of information, as well as lack of time, will prevent Parliament from producing statutes that are detailed enough to make delegated legislation unnecessary; yet the delegation of absolute ad hoc decision-making

powers to informed individuals other than courts is contrary to certain postulates of the Rule of Law. Delegated legislation, being formulated by specialists in coherent normative instruments, is thought to be an adequate intermediate solution which preserves the values of democratic decision making.

The problem of information suggests several other justifications for delegated legislation. The technical and scientific complexity of many regulated activities makes the intervention of experts indispensable to the articulation of norms. Again, the field to be regulated may be in such a state of flux that constant re-evaluation and reformulation of established rules will be necessary. Further, there might be a need to ensure the active participation of the regulated industry in the regulatory process. Each of these is a priority to which Parliament cannot easily respond but which is the stock-in-trade of executive departments and regulatory agencies.

A third congeries of justification is tied to bureaucratic dynamics. Any administrative scheme requires internal and procedural rules that rarely can justify parliamentary attention. Even the rules of practice in ordinary courts take the form of delegated legislation. Moreover, it is thought that formalized statements of internal management that set hierarchies of authority and function are preferable to in-house manuals and organigrams (charts of who reports to whom) as a means of establishing and publicizing administrative procedures.

A final reason for a regime of delegated legislation flows directly from the imperatives of the Rule of Law. Statutes, being concrete political judgments, should be simple, accessible and of a permanent character; these qualities would be sacrificed if Parliament were to review the details of administrative policies. Further, if the objectivity of law is to be maintained, it must be isolated from politics. The explicit objectivity required by the Rule of Law is thought to be best preserved by legal experts in the civil service, who can translate the general political judgments of statutes into detailed rules via delegated legislation.

Of course, current Canadian practice renders each of these justifications as much myth as reality: statutes frequently approach regulations in their detail, while regulations at times imitate statutes in their permanence. On occasion, Parliament will endlessly debate the particulars of legislation and canvass public opinion widely, whereas the Governor-in-Council and administrative agencies often fail to consult even directly affected parties; regulatory statutes sometimes will be devoid of contentious political judgments, while regulations will advance an overtly political purpose. In other words, it is impossible today to assert any clear political, technical or functional division between these two legislative modes.

But it is far from true that all legal commentators are reconciled to delegated legislation. In addition to being generally troubled by the volume of regulations, many have expressed concern about the mechanics of this

form of law making.[22] Historically, the more important of these have been procedural: skeletal statutes, such as the War Measures Act, often were employed in important cases; enabling sections were frequently uncertain, unclear, too general and highly subjective; regulations habitually were made without adequate public consultation and were insufficiently publicized; delegated legislation was often vague; the broad scope of delegation effectively removed parliamentary control, and transformed the civil service into a legislative body.

In recent years, however, more substantive questions have attracted interest, even though many of the above criticisms remain largely true.[23] Today, commentators note the failure of governments to take adequate account of the economic cost and benefits of a regulatory bill before its enactment. Again, they point to the failure to review the existing regulatory mass periodically so as to weed out spent, duplicatory, ineffectual or inappropriate regulations. Third, some suggest that regulation making is a closed shop, where powerful interests may obtain unfair participatory advantages out of the light of public scrutiny. Finally, many specialists protest about the lack of a central mechanism for the consolidation and publication of regulations, and the imprecision of definition, which permits a mountain of unpublished quasi-delegated legislation to be generated.

As in the case of the justifications for deploying delegated legislation, empirical evidence supporting these concerns is equivocal. For example, many substantive criticisms are not directed to delegated legislation as such, but to governmental regulatory activity in general: in this respect, the recommendations of the McRuer Commission are typical. Further, the procedural complaints often amount to a plea to make the regulation-making process more parliamentary: subordinate rules should be highly formal and should be framed only after political negotiation with the affected parties. In other words, some modern criticisms of delegated legislation seem to leave little scope for the institution under any conditions.

It is hard to escape the conclusion that both appreciation and critique of regulations seldom come to grips with the merits (or demerits) of this form of law making. This is particularly unfortunate in view of the opportunity for creative legal ordering that delegated legislation presents. Instead of a nuanced assessment of the variety of goals that may be pursued through regulations, one typically gets abstract theories that assume that legal form ought to be conclusive on the issue of an appropriate legal regime. Yet delegated legislation is deployed in a wide variety of contexts. The designation of fruit trees for the purposes of a fruit protection statute, the Rules of Practice of the Supreme Court of Canada, customs classifications, and the procedure and criteria for civil service appointments are all subject to exactly the same legal regime, despite their radically different objectives. In order to profit from recent criticisms of regulation making, therefore, this legal regime must be examined in detail.

The Evolution of the Legal Regime of Delegated Legislation

The legal regime of delegated legislation has attracted significant discussion and comment since World War II.[24] Studies reveal not only that there has been an appreciable increase in the volume of regulations since 1945, but also that the scope, language and objectives of delegated legislation have evolved in tandem with changing regulatory priorities. Three general periods may be isolated.[25] From the end of the war until the late 1950s, regulation consisted primarily of a continuation of wartime controls over labour, land use, customs, wheat marketing, housing, food and drug standards, and so on. At this time, delegated legislation was deployed almost exclusively to flesh out the details of statutory standards. There followed a second period, roughly corresponding to the Diefenbaker years (1957–63), when new initiatives such as ARDA (Agricultural Redevelopment) were undertaken. While these displayed many of the characteristics of the regulatory structure we know today, they were infrequent and usually non-contentious. Then, from the mid-1960s to the late 1970s, a further regulatory impetus developed. Unlike its precursors, this endeavour often had a non-economic, widely diffused and comprehensive aspect. Delegated legislation became the principal regulatory tool during this period.

Not surprisingly, attitudes toward regulation and delegated legislation also evolved in the postwar period. Little academic comment, legislative action by way of control over regulations, or judicial scrutiny (beyond abstract jurisdictional conceptualization) characterized the first two periods. By the late 1960s, however, both the McRuer Commission and the MacGuigan Committee had reported, and a new interest in regulations developed. Provincial and federal parliaments quickly undertook substantial reform of the legal regime governing delegated legislation.[26] Nevertheless, despite these reforms, academic, parliamentary and judicial criticism has continued.

Because the regulation-making power still draws fire, a general assessment of these reform initiatives is necessary. Particular attention will be paid to questions of definition, of promulgation and publication, consolidation, parliamentary scrutiny, advance consultation, and the language and drafting of regulations.[27]

The federal Parliament's attempt to define the term "regulation" in the Statutory Instruments Act is symptomatic of developments in other jurisdictions. While this statutory definition is sufficiently broad to encompass, in theory, any instrument produced by virtue of legislative powers granted by statute — including directives, orders-in-council, rules and the like — in practice it has not simplified the problem of determining whether or not a given instrument is a regulation for the purposes of the formal requirements respecting notice, consultation, publication and scrutiny. Two

issues seem constant: too many statutory instruments fall outside this definition, and too many quasi-instruments — which cannot be subjected to the regime set out in the Act — are deployed in governmental regulation. Consequently, even though the formal requirements set out by this statute are thought to be desirable, they frequently do not apply to major state regulatory activity.

The method of promulgation and publication of regulations has also attracted attention. While the federal Parliament and many provincial legislatures have imposed a duty to register, file and publish delegated legislation, the numerous exemptions to these requirements allow a substantial number of statutory instruments and regulations to remain unpublished. Moreover, since not every jurisdiction has produced a recent consolidation of existing delegated legislation, the time and effort required to assemble a dossier of applicable regulations in any particular case is daunting.

The creation of structures for permanent parliamentary, cabinet and internal supervision of regulations represents another important development in the legal regime of delegated legislation. Each of these forms of control has been implemented in several jurisdictions. Mechanisms for parliamentary control originated in Saskatchewan in the early 1960s and were adopted by the Ontario government in 1969 and federally in 1971. However, the purely advisory function of parliamentary committees severely limits their effectiveness, even though both a priori and a posteriori control may be exercised under a wide variety of substantive headings.[28] Perhaps the most structured forms of internal control have been developed in Quebec, where the *Bureau des règlements* scrutinizes all proposed regulations. Quebec also has established an internal mechanism to screen the economic effect of regulations, although, unlike some other jurisdictions, no formalized political control is imposed through a cabinet committee.[29]

The clandestine manner in which many regulations are conceived constitutes one of the most contentious issues in the delegated legislation debate. Commentators note that the more diffuse the interests affected, the more a regime of formalized procedures ought to replace informal consultation. However, no Canadian jurisdiction has imposed a generalized requirement for rule-making hearings, advance consultation with interested parties, or publication of draft regulations.[30] While many have enacted individual statutes in which various types of prior consultation are required, to date only Quebec has made such extensive use of prepublication and formal consultation that it can be said to have formulated a general theory of advance consultation.

As is currently the case with all forms of legislation, the language, drafting and style of regulations have been carefully scrutinized. Of course, because regulations are deemed to be law, if they are federal they must be promulgated in both English and French; in Quebec, they must be bilingual within the limits established by section 133 of the Constitution Act, 1867.

Analogous requirements apply in New Brunswick and, as a consequence of the recent reference before the Supreme Court of Canada, in Manitoba. Again, the formal legal status of regulations means that courts must take judicial notice of them. However, these issues tend not to be of great moment to most analysts. Conversely, the mode of drafting regulations themselves, and the scope of the language of delegation, frequently continue to provoke complaints.[31] Critics note the failure to cross-reference regulations with enabling legislation and amendments, the increasing use of complex definitional formulae and subjective grants of regulation-making authority, and the excessive referential incorporation of other material into regulations.

Despite these continuing defects, there is no doubt that, at least formally and procedurally, the legal regime of delegated legislation has been substantially clarified and improved since 1945. Yet the continuing concern with the regulation-making process perhaps suggests that traditional non-judicial mechanisms for controlling the making and promulgation of legislative instruments are inadequate to their stated objectives. For each new definitional requirement, a subdefinitional exception seems to develop; for each new control procedure, expediency and necessity produce an antidote. In sum, the legal regime, when applicable, is more legal than ever before. But whether it has led to substantively better results is not so clear.[32]

Judicial Review of Delegated Legislation

In one sense, the principles governing the judicial review of delegated legislation have remained constant for the past thirty years: judicial supervision is still grounded in an abstract theory of jurisdiction so that court review of the policy merits of regulations is minimal. However, the subject has evolved in a remarkable way: several legislatures have formalized the regulation-making power and simplified remedial principles; courts have shown a greater willingness to enlarge doctrinal categories to sustain their authority; and the bar has not shied away from challenging delegated legislation before the courts. Clearly, theory has not kept pace with modern developments, even though judicial attitudes toward regulations have evolved from the deferential to the activist.[33]

The arguments that may be raised in an application to have the court review regulations are of essentially two types: those that relate to the creation and coming into force of delegated legislation, and those relating to the scope of the promulgated regulation. In the former cases, courts have usually sanctioned default with invalidity. Hence, where a mandatory procedural requirement for the making of a regulation, such as the holding of a hearing, has not been met, the resulting instrument is void. Where, however, the formality relates simply to the coming into force of a

regulation, such as the requirement for registration, publication or approval, failure to comply does not make the regulation invalid, but merely deprives it of legal effect.[34]

Other grounds for judicial review arise from the interpretation of the enabling statute and may be seen as particularizations of the *ultra vires* principle.[35] Thus, where the subordinate instrument is not authorized by the primary statute, it is invalid. Where it conflicts with other statutes, where there has been a subdelegation, or where a regulation imposes penalties or is given a retroactive effect and the primary statute does not specifically permit the conflict, subdelegation, retroactivity, and so on, it will also be declared invalid. Similarly, courts will review regulations where they are vague, discriminatory or "totally prohibitive," or where they have been enacted arbitrarily, capriciously or in bad faith, or where they fail to achieve a standard of normativeness. Of course, if a regulation or its enabling statute is unconstitutional, it will also be held to be *ultra vires*. Each of these grounds for review is formalistic and, theoretically, does not touch the advisability or the substantive merits of the impugned regulation. Nevertheless, all commentators acknowledge that varying patterns of judicial deference to legislative intention, much more than abstract principles of jurisdictional error, shape the actual scope of review.

Aside from allusions to the complexity of remedies, surprisingly few complaints about judicial review principles themselves have been voiced by the critics of delegated legislation. This has been especially true since courts began in the late 1960s to consider the substantive rationality of regulations through principles such as bad faith, arbitrariness, vagueness and discriminatory effect. However, sensing the potential impact of increased litigiousness and judicial activism, legislatures frequently have responded by granting regulation-making power in both wide and subjective terms. By authorizing delegated legislation "as the delegate deems, in his sole discretion, to be in relation to [a given subject matter]," substantive judicial control through jurisdictional challenges may be significantly reduced. Present patterns of delegation confirm an increasing tendency toward regulatory subjectivism;[36] it remains to be seen if courts will, or can, parry this recent legislative thrust.

Delegated Legislation in Perspective

Notwithstanding the significant modifications to the legal regime of delegated legislation undertaken over the past thirty years, the current state of the law continues to attract widespread criticism. Many lawyers who accept delegated legislation as an important element of the regulatory enterprise are dissatisfied with existing controls over the creation and application of regulations. Those troubled by regulation in general also deplore the

failure to require substantive evaluations of the desirability of any given set of regulations.

As early as the MacGuigan and McRuer reports, various principles thought necessary to improve the legal regime of delegated legislation were enumerated. These included recommendations for (i) clarity and precision in enabling legislation; (ii) the prohibition of retroactive regulations; (iii) a guarantee of judicial review; (iv) a disallowance power in the cabinet for regulations made by other bodies; (v) a prohibition on authority to amend statutes by regulation; (vi) a prohibition on taxation by regulation; (vii) a prohibition on the imposition of sanctions by regulation; and (viii) the requirement that regulation-making powers not be granted in subjective terms.

These recommendations are reiterated, along with pleas for a better definition of what constitutes delegated legislation, for an affirmation of its constitutionally subordinate status, for limits on ambulatory incorporations by reference, and for more comprehensible drafting of regulations, in the second report of the standing joint committee of the Senate and of the House of Commons on regulations and other statutory instruments.[37] In other words, if even these basically sympathetic critics are to be reconciled to an extensive deployment of delegated legislation, it may be necessary to develop formal controls that actually trespass upon the substance of what may be legislated subordinately.[38]

But current legal criticism extends well beyond the merely formal aspects of the regulation-making power and the minor limitations upon substance which that form implies. In the report of the special Commons committee on regulatory reform one finds nothing less than a frontal assault on delegated legislation.[39] This report sets out a lengthy series of recommendations relating primarily to regulations. Many of these, including suggestions for improved private sector consultation through mailing lists of interested parties, the semi-annual publication of regulatory agenda and the prepublication of draft regulations for notice and comment, reflect concerns similar to those of the standing joint committee and the MacGuigan committee. However, the Commons committee also suggests the enactment of some substantive controls upon regulation making: mandatory economic impact assessments, the evaluation and pruning of existing regulations, parliamentary review of the advisability of proposed regulations, sunset laws, and voluntary regulation — all are advanced as a means of reducing the existing mass of delegated legislation. The Economic Council of Canada has adopted an almost identical perspective.[40] Their recent study explores various proposals for deregulation and proposes cost-effectiveness assessments of all proposed regulations.

There is no doubt that commentators today view delegated legislation as a symptom of governmental regulation in general. High on the reform agenda of the 1980s are two themes. The first is the formalization of the

process of regulation-making through legal controls, such as access to information, prepublication, parliamentary scrutiny, clearer definition of regulations, and enhanced judicial review. Here one sees the continued influence of the lawyer's concern for due process which resurfaced in the mid-1960s. The second theme is substantive control over the volume and scope of regulations through sunset laws, regulatory budgets and deregulation, as well as control over the merits of proposed regulations through economic impact assessments and the deployment of alternatives such as voluntary regulation and consensus standards. Here one sees the economist's concern for efficiency reflected in suggestions for legislative non-intervention.

Were one to predict a future for delegated legislation on the basis of the current preoccupations of legal analysts, it would surely encompass increased formalism and parliamentary inertia. It appears that the only way to reconcile the lawyer's desire that regulation become more lawful (i.e., take the form of delegated legislative instruments enacted and promulgated with a deference to form equal to that required of parliamentary legislation) with his concern about access to legislation (i.e., that the mass of regulations and statutory instruments not become unmanageable) is for Parliament to curtail its visible regulatory endeavours — that is, to adopt the model of free market economics and cease delegating legislative powers. The likelihood of such a development will be evaluated in the fifth part of this study.

What is Regulation?

Although in the past the point has been a matter of some debate, few commentators — be they legal theorists, political scientists, or economists — today equate the phenomenon of governmental regulatory activity in general with the legal conception of regulations. Nevertheless, most analysts see "regulation" as only one particular form of state economic activity. As a governing instrument, it may be contrasted with Crown corporations, public inquiries, taxation, subsidies, liability rules, bargaining, marketable property rights and anti-combines prosecutions. The following definition of regulation is typical:

> . . . the imposition of rules by a government, backed by the use of penalties, that are intended to modify the economic behaviour of individuals in the private sector.[41]

This conception of regulation has two main features. First, it restricts the formal purview of the regulatory enterprise to visible, direct or delegated regulation through statutes, delegated legislation, or the output of statutory authorities. Second, it limits the substance of regulation to state activity that is intended to control market behaviour.

It is not difficult to cite examples that illustrate how the classical view

of regulation, if taken as exhaustive of the processes of government, presents a misleading picture of state economic activity. Why should a statute or a regulation requiring disclosure in a consumer contract, or imposing various product safety warranties, be seen as an example of regulation, but the creation of a Small Claims Court (in which equity between the parties prevails over the strict legal doctrine of *pacta sunt servanda* and in which consumer access to judicial remedies is improved) or the enactment of class action and treble damages legislation (which facilitate private enforcement of rights) be not so characterized? Surely both alter the balance of market forces between buyer and seller in almost identical ways.

The basic assumption reflected in the traditional view — that the term regulation should be restricted to statutory initiatives that are analogous to the criminal law (i.e., that it comprises only written rules, backed by explicit coercive sanctions made and enforced by officials), reveals a rather undiscriminating view of legal normativeness to which few legal theorists would subscribe. Not only does this view exclude the possibility of a common law of regulation (e.g., rules relating to unconscionability in contract, which have been developed by courts in private law litigation), it also ignores the existence of a bureaucratic law of regulation (e.g., informal rules relating to the exercise of the discretion to enforce that arise from the internal dynamic of bureaucracies). More importantly, this perspective does not countenance the fact that non-normative government initiatives will stimulate market reactions similar to those flowing from explicit legislative rules.

It is also easy to suggest counterexamples to the classical view of the substance of regulation. Why should direct negative intervention in the market be seen as regulation, but positive intervention (by way of tax relief or subsidy) and non-intervention (by way of legislative quiescence) be not so regarded? Further, why should delegated bureaucratic discretion be viewed as regulation, but not the delegated private sovereignty that we associate with private property? It is equally difficult to see why the discretionary decision-making power vested in an agency is considered to be regulatory, but the same authority vested in a court is not. In all these cases, the net economic effect of the policy initiative is similar.

Underlying this conception of regulation is the assumption that the kind of state economic activity that makes the modern market possible, or sustains it through political, social and technological change, is fundamentally different from that which controls or otherwise interferes with it. This view is the economic equivalent of the "state of nature" hypothesis, long discredited in political theory. In other words a conception of the naturally occurring market, existing separate from the complex of social, cultural and moral commitments of its participants, is the unargued and unjustified major premise in the analytical syllogism of regulation theorists who expound the classical view.

Of course, it is not claimed here that there is no difference between various forms of state economic activity; nor is it asserted that governmental initiatives setting the preconditions for a market to operate, cannot in some measure be distinguished from those that impinge upon it. Rather, the point is that if one wishes to understand the patterns of visible regulation, and especially delegated legislation, since World War II, it is inadequate to adopt a view of government initiative that excludes several major forms and objectives of state activity. A failure to elaborate a model that takes into account the entire regulatory environment may well lead to false theses about regulatory growth, when all that has really occurred is the suppression of non-obvious state economic activity and its transmutation into the particular form of visible governmental initiative, which certain modern critics stigmatize as regulation.[42]

In the final section of this part of the study, both the reasons for, and implications of, viewing regulation as any activity of government that bears on public economic behaviour — including the decision to let the market decide — will be explored. But this endeavour demands, as a preliminary, an inquiry into the complex of institutions, processes and sanctions by which public policy is translated into normative requirements. That is, before one can evaluate the merits or demerits of any limiting definition, it is necessary to have in view the range of possible elements for inclusion.

The Range of Regulatory Institutions

Even if one were to adopt the classical view of regulation, the inventory of institutions performing a regulatory role would be extensive. Modern government deploys a vast array of structures and bureaus to accomplish public policy. These range from the highly formalized and legalistic to the informal and consensual, and include several intermediate modes. What is more, a host of distinct officials perform differing regulatory tasks within each of these institutions. Who exactly are these regulators?

If regulation is tied to governmental authority to make rules or exercise discretions intended to modify behaviour, then a regulator is any person vested with such powers. In this definition, Parliament itself is the principal regulator. But since rules are not self-executing, an imposing bureaucracy of enforcement and interpretative personnel is required. Hence, one must develop an inventory of those to whom the authority to make, enforce and interpret rules has been delegated, as well as of those upon whom a discretionary power to make decisions has been conferred.

No doubt, the general public conceives of the civil servant and the agency functionary, whether a senior member of a regulatory commission or a relatively anonymous inspector, registrar, commissioner or clerk, as the archetypal regulator. Yet to limit one's conception of regulatory personnel to employees of the executive branch of government (or of one of its specialized agencies) is misleading in two ways.[43] First, in Canada, a great

deal of regulation is undertaken by politicians: the Treasury Board, the cabinet, individual ministers, and the Governor General or Lieutenant Governor — all have wide, direct regulatory authority (whether through the power to make regulations and issue binding directives or to hear appeals from the decisions of other bodies, i.e., cabinet appeals). A second and more important point is that various non-executive personnel perform a significant regulatory role. Thus, parliamentary committees, the Ombudsman, the Auditor General and judges serving as *personae designatae* under a regulatory statute frequently act with the same effect as the public service or the cabinet.

But there are further formal institutions of regulation. These may be executive personnel charged with enforcement, such as the police; investigatory and recommendatory functionaries such as royal commissions; or proprietors, such as Crown corporations. These institutions also include elected legislative bodies that are often assumed to be government itself, such as municipal councils and school authorities. Finally, even members of the judiciary, whether adjudicating a dispute under a regulatory statute or applying a common law rule, are regulators: the power to decide the meaning of a rule is no less a regulatory power than the power to make the rule. With the possible exception of the inclusion of courts as regulatory officials, all the above would be understood, even in the classical view, as officials in a regulatory scheme; and, once the regulatory role of these other persons is acknowledged, a similar role cannot be denied to the courts. This follows because judges are not mere automatons applying pre-existing rules by rote while exercising no discretion and making no policy choices. Every judicial decision involves the elaboration of the policy that the rule being applied is thought to promote.[44]

Yet, regulation is frequently not carried out by official organs of the state at all. Many regulatory statutes are structured so that a form of semi-public regulation is established. Self-regulating professions and producer-owned marketing boards are the most notable examples of these non-governmental regulatory delegates.[45] Moreover, various other forms of legislatively organized semi-private associations, ranging from the quasi-voluntary to the quasi-obligatory, exercise a regulatory role: here one might include the trade union, the cooperative, the corporation, the charitable organization, the employers' association, or the cartel.[46] The decision to recognize these bodies and to give them statutory advantage means that they have been delegated a broad discretion to put into effect government economic policy. Thus, limited liability regimes for corporations (but not partnerships) amount, in so far as investment and manufacturing decisions are concerned, to a status that parallels the discretion to set conditions of membership given to a provincial bar association.

Surprisingly, the reach of regulatory delegation is even greater than these examples suggest; for the irony is that almost every recipient of governmental largesse performs a semi-public regulatory function.[47] That is, the allocation

of direct subsidy or indirect rebate in the form of welfare, family allowances, old-age security, unemployment insurance, RRSP credits and the COSP rebates, permits each beneficiary to disrupt any pre-existing distribution of resources. The plague of fly-by-night home insulation companies consequent upon the Canadian Home Insulation Program shows poignantly how the delegation of excessive regulatory discretion to a multitude of would-be regulators (CHIP applicants) distorts the market and leads to regulatory anarchy.

A further example of an almost private regulatory scheme can be seen where a special legislative regime (such as that which gives banks an exclusive right to take preferential security from certain debtors) delegates to private financial institutions the authority to implement (in respect of individual loan applicants) government policy in support of some categories of borrowers.[48] In all such cases, a non-market distribution places assets or economic advantages in the hands of the recipient, under a general regulatory regime. The recipient then exercises an almost unlimited discretion to deploy or dispose of these assets or advantages in furtherance of the general policy. These last observations suggest a final point that is explored in detail later on in this study: the public recognition and enforcement of exchange relationships and private property (in land, goods or ideas) gives owners a powerful regulatory discretion; the market itself is a regulatory instrument.

It follows that a proper conception of regulation cannot be grounded in the assumption that the answer to the question, "Who regulates?" may be found by simply producing an inventory of statutory boards or agencies established within the formal confines of the public bureaucracy. While a first approach to the definition of regulation, subject to nuances set out in the next sections of this study, would begin with the classical view, a functional analysis of the actual exercise of government-authorized discretion to influence market distributions illustrates that nearly all citizens are, in some measure, regulators. To limit one's set of regulatory personnel to public and semi-public bodies is not only to ignore some of the most powerful delegates of regulatory power; it is to impose a false dichotomy, which generates a specious, self-referential legitimacy for public regulation undertaken by so-called private decision makers within the confines of the market.

Processes of Regulation

The traditional approach of lawyers to legal processes is to conceive of legislation and adjudication as the exclusive tools of the law. It is not surprising, therefore, that most commentators advance theories of regulation that are solely responsive to these forms. Even discriminating analysts are content to set out a taxonomy of regulatory instruments that categorizes only kinds of legislative instrument and types of adjudicative tribunal. In short, the classical view of regulation seems to presuppose that statutes

and delegated legislation exhaust the legal forms through which governments may impose rules to modify economic behaviour.

Nevertheless, many current legal theorists find this conception of the processes of social ordering inadequate. Any complete conception of ordering processes would account for items such as contract, custom, voting, mediation, markets, and so on.[49] Formalized legislative rules are only one form of legal normativeness; and adjudication is not the only process of legal decision making.[50]

Whether ordering processes other than legislation and adjudication should be characterized as legal is a question that it is not necessary to answer at this point. Either one considers them to be law — in which case the formal state is seen as a subset of a society's legal endeavours (i.e., law can be formulated by bodies other than state institutions), or one considers them not to be law — in which case one claims that law is a subset of political activity (i.e., the state regulates by legal and non-legal means). Nevertheless, these other processes must be accounted for in any conception of governmental regulation.[51]

Of course, to adopt a more comprehensive conception of rule-making processes is not to deny that explicit legislation and its variants (regulations, directives, rules, by-laws and policy statements), whether formally integrated into the hierarchy of legal norms or not, are among the most important regulatory processes. But normativeness also arises from customary practices (stabilized patterns of interaction), from contract, from conventional understandings of "the way it's done," from mediation, from the "invisible hand," and from the extrapolation of adjudicative decisions by way of precedent. In other words, even by the classical definition (which refers to rules imposed by government), any social ordering process by which rules either are enacted or may emerge ought to be an item on the inventory of regulatory mechanisms, if it implicates the state.[52]

Those who adopt the classical view acknowledge this point to some degree. In arguing for broader consultation before rules are made, they are seeking in fact to make legislation by negotiation and mediation: voluntary regulation can emerge successfully from processes where informal interactional expectations become stabilized (e.g., a gas exporter comes to know from past experience that it will get its desired permit if it hires a certain percentage of, say, native Canadians for a new exploration project); "consensus standards" are no more than negotiated rule making through a contractual form; and the desire for comprehensive publication of decisions flows from a belief that rules may be extrapolated by precedent. All that is missing from the classical view is the recognition of the general theoretical framework.

A further point is that adjudication is not the sole means of resolving a dispute or enforcing a penalty.[53] A variety of other tripartite decision-making processes are commonly deployed. These include purely managerial processes (discretion in its strong sense), consultation, and investigatory

and recommendatory processes. One must also consider uniparty processes, such as property regimes, and the use of brute force or brainwashing; bipartite processes of resolving disputes, such as contract (e.g., tax relief agreements for regional economic development), custom, deliberate resort to chance (e.g., allocating drilling licences for offshore resource development) and mediation; and multiparty processes, such as elections (e.g., agricultural producers voting to establish quotas).

Simply because formal adjudication by a court or an agency performing a quasi-judicial function is not the mechanism being deployed to resolve a dispute does not mean that interpretation, application and enforcement of a regulatory policy is not taking place. In fact, the recurring move to make official discretions more judicial is compelling evidence that regulated parties have reached precisely this conclusion. Once again, as long as a governmental agency is involved in these processes, even on the traditional view of regulation, a regulatory policy is being pursued.

The import of the above paragraphs is not just that a conception of regulation as explicit, legislated rules, applied in an adjudicative or quasi-adjudicative judicial forum, is descriptively inadequate; it is also that the classical conception is unsuitable as a prescriptive model. Regulation can be seen in each of the processes of social ordering just reviewed — whether it arises from pre-existing rules, from the attempted application of such rules to particular cases, from the "invisible hand" itself, or from the exercise of a so-called discretionary authority. Functionally, it may consist of controls that are normative or ad hoc, that arise from command, persuasion or negotiation, and whose imposition may be either direct or delegated. To evaluate all forms of regulation against a standard drawn from idealized conceptions of the legislative and adjudicative processes gives rise to an artificial symmetry and simplicity, leads to misguided attempts to make all government activity either explicitly legislative or judicial, and induces commentators to discount the importance of less formal and less visible regulatory processes.[54]

Compliance and Regulatory Sanctions

In much recent literature, analysts fail to keep the problem of regulatory processes separate from the problem of regulatory sanctions. It is often thought that the imposition of ex post facto judicial sanctions is the logical concomitant of any scheme of legislative rule making.[55] In the present section, however, the term "sanction" will be understood more generally as the means by which individuals are induced to comply with a regulatory policy, whoever is regulating and however the regulation is structured.[56] In other words, regardless of whether the regulator is the Governor General or an agricultural marketing board (not to mention a chartered bank or a welfare recipient), and whether the regulatory policy is grounded in pro-

hibitive rules, permissions, contractual undertakings or ad hoc orders, it is necessary to develop a strategy for ensuring compliance.

Current economic studies of regulatory sanctions invariably emphasize the "command and control" approach to compliance.[57] In this framework, which focusses on coercive sanctions applied by courts, one sees a reflection of the criminal law model of fine or imprisonment. But today, along with a more discriminating view of criminal law sanctions (involving notions of diversion, publicity, community service, compensation and so on), lawyers are developing a more subtle model of compliance in administrative law.[58] Commentators now recognize that the range of regulatory sanctions is at least as extensive as that found in the criminal law.

One could begin to develop a compliance typology by distinguishing between various kinds of penalties, such as those involving freedom, wealth or reputation. But this approach already assumes that compliance is achieved by means of detriments imposed ex post facto. A more fruitful inquiry would be to commence by distinguishing penalties and rewards. For example, imprisonment, fines, forfeiture, tax liability, expropriation, exclusion (revocation of licences and permits), probation, suspension, adverse publicity, exposure to civil action, or any combination of these, are coercive penalty-sanctions. By contrast, direct subsidy, investment, tax relief, protection of monopoly, franchising, the awarding of government contracts, premium rebates, client or customer access to desired commodities (e.g., CMHC mortgages), exemptions from existing regulatory regimes (e.g., language, environmental or employment standards) and so on, can be seen as reward-sanctions or benefits.

Of course, the classic definition of regulation appears to contemplate only penalties as a means of ensuring compliance. But functionally, a fine imposed for breach of a regulatory norm, and a subsidy given for long-standing fidelity to that norm, are equivalent inducements to compliance. To take an example: if a policy of inducing financial institutions to make mortgage money available to homeowners were thought desirable, it could be pursued by (i) requiring a certain percentage of loans to be of this type; (ii) setting quotas, the achievement of which would entitle lenders to avail themselves of government mortgage insurance; (iii) threatening to withdraw government deposits from non-complying institutions; (iv) permitting interest charges to rise above authorized rates. In each case, a regulatory policy is in effect and compliance is being directly encouraged.

These considerations point to an important characteristic shared by both penalties and rewards: they are direct and explicit. The persons subject to them are invariably conscious of their applicability, and knowingly modify their conduct either to avoid a detriment or to take advantage of a benefit. By contrast, a more subtle and, in the long run, more effective kind of sanction may be characterized as attitudinal or (put more affirma-

tively) governed by conditioning and belief.[59] While conditioning may in many contexts be explicit, frequently the person subject to it will not know of the specific regulatory purpose being pursued or even realize that a general regulatory enterprise exists. Successful regulation need not rely on only the carrot or the stick.

The most obvious means of imposing an attitudinal sanction is publicity (be it praise or blame, be it through investigation or advertising). Yet the very connection of praise or blame to specified conduct makes the sanction explicit; in this sense, publicity often amounts to a penalty or a reward. True conditioning exists when general attitudes are induced, or when reflexive behaviour is stimulated. These more subtle, but more effective, generators of compliance are myth, tradition, education, religion, culture and superstition (be this nurtured in a law school or in a business school).

To varying degrees, attitudinal sanctions attain their regulatory goals precisely because they are not perceived as sanctions. Rather than being the concomitant of identifiable normative requirements, they produce patterns of behaviour that cannot be defined by specific standards of achievement. They induce regulated parties to "think or behave appropriately." At the level of the actions of the general public, one may identify "Buy Canadian" campaigns, nationalistic appeals to patronize Air Canada, Via Rail and Petro-Canada, and United Way advertising. Each of these is potentially more efficient and less costly to administer than either identifiable tariff barriers or direct subsidy. Here the truly operative sanctions — guilt, pride and self-interest — are rarely consciously felt.

The most important type of conditioned regulation of business enterprise is the "free market" myth. Adam Smith's "invisible hand" metaphor aptly captures the fact that private interest can be put to public use. By encouraging a public ideology of "market freedom" (even though all participants know that the reality is otherwise), governments are able to delegate (with very few formal guidelines) control over large sectors of economic activity to selected private institutions.[60] A belief in the public use of private interest allows the state to avoid having to clean up the debris caused by bankruptcy or oligopoly itself. If all parties are willing to ascribe their misfortune to the laws of the market rather than to a deliberate governmental policy, responsibility for economic chaos can be off-loaded to the inexorable "invisible hand." Interest rate policies, money supply, deficits and secured transaction regimes escape public scrutiny and opprobrium.

But major business enterprises are also interested in the private use of public interest. Hence, the most efficient tool of regulation is a government's power to auction access, and this has an identical dynamic to the "free market" myth. The irony is that using access to gain compliance is the wise administrator's technique for avoiding "agency capture." Agency capture occurs when a regulator moulds his policies to serve a client's objective because he has been conditioned to accept the client's perception of the regulatory situation. Client capture results because the ability

to have input into the development of regulatory policy and advance notice of regulatory initiative are valued commodities. Having gone publicly on record as being committed to market freedom, business needs to know when the government really plans to let the market decide.

Together, these forces — the invisible hand and the need for information — produce a situation where it is much more important for aregulated party to be a friend of the policy makers than to be perceived as merely complying with their specific rules. Astute regulators recognize that access to information and to themselves is a valued commodity, and deploy it to induce desired behaviour by a target group under the guise of their own co-option into the priorities of the regulated industry. One might even claim that this form of regulatory symbiosis is the *conditio sine qua non* of effective public policy making.

To conceive of conditioning as a regulatory sanction, or even as a compliance mechanism, would be incoherent, according to the classical view. But once again, these commentators implicitly acknowledge the importance of attitudinal sanctions. If one is prepared to acknowledge that governments may influence market behaviour by advertising — that is, if conditioning can be a regulatory instrument — then surely conditioning can be a sanction as well. The call for voluntary regulation, consensus standards, notice and comment requirements, informal contacts and plea bargaining is an acute example of an attitudinal sanction in operation.

Just as legal theorists no longer take the linear approach to legal ordering implied in Kelsen's "law is the norm that stipulates the sanction," regulation theorists are now developing models that take account of non-cause/effect compliance strategies. Understanding sanctions in this larger context helps reveal the nature of agency capture. Agency capture, like police and prosecutorial discretion, is not in itself an evil, but is a regulatory strategy operating in tandem with client capture. Especially as it is reflected in the idea of market freedom (and its corollaries), this capture is the truly operative regulatory sanction. To ignore non-coercive compliance strategies is to forget the invisible hand — the basic premise of the market economy.

A Working Definition of Regulation

Because the question, "What is regulation?" ultimately is one of definition, and because definitions can be neither true nor false in themselves, it is obvious that the selection of any given view of regulation will rest on fundamental assumptions about the state, law and economic behaviour. In this section, a relatively expansive conception of regulation has been mooted, in preference to the intermediate view advanced by most economists and political scientists, and the narrow view held by many lawyers.

The position is, of course, not novel. For example, the Committee on Government Operations of the U.S. Senate suggested that regulation could be defined as follows:

> "Regulation," if defined in the broadest possible way, could include virtually everything which the government undertakes, since most of what the Federal Government does provide benefits and imposes restrictions. Thus, in the large sense, grant programs, research and development programs, procurement programs, tax code provisions, and the numerous benefits which the government provides for individuals have regulatory aspects.[61]

Nevertheless, the classical view prevails in present-day studies because it is felt that these wider definitions do not adequately distinguish between regulation and other public policy instruments, such as moral suasion, taxation, subsidies, public ownership, and so on. But this critique rests on a *petitio principi*: in fact, in no study of government regulation is the classical view ever explicitly argued for.[62] By contrast, throughout the analysis of institutions, processes and sanctions just presented, specific reasons for the broader approach were advanced. What is more: on any functional criterion, the conception argued for in this study is more descriptively accurate of state economic activity than any other.[63]

In addition to the above reasons, there are three other justifications for rejecting the classical view of regulation.[64] First, if one's objective is to understand and evaluate the uses of delegated legislation as a vehicle of government policy implementation, the more comprehensive the range of alternatives considered, the more likely one is to appreciate the specific merits and demerits of this mechanism; in other words, the development of a calculus of instrument choice presupposes a common analytical framework. Second, if one is truly interested in assessing the extent to which state economic activity has grown, a theory that encompasses both visible and non-visible regulatory techniques and strategies must be adopted; failure to do so may well lead to suspect conclusions about the extent of former governmental activity. Third, if one desires to predict future trends in state economic regulation, anticipating the effects of "deregulation" or "non-regulation," a model is required that accounts for regulatory outputs as well as inputs; the distinction between the law in books and the law in action translates in the language of systems theorists into the distinction between formal (static) and working (dynamic) models.

The view of regulation set out in this part pursues each of these objectives. In addition, it suggests several corollaries, all of which are more congruent with current social theory than corollaries derivable from the classical view.[65] For example, the working definition does not incorrectly presuppose that law can arise only from explicit norm-creating activity. In other words, it embraces implicit as well as made law. It also is compatible with a rejection of the false dichotomy of public and private law. That is, it recognizes that private law today is no more than the delegation by Parliament to courts of regulatory authority in the realms of property, tort, restitution and contract. The definition suggested does not rest on the discredited assumption that the modern market economy is a natural phenomenon. Rather it insists that the market, like any other economic

meta-system, is a social achievement. In the final analysis, it is this congruence with modern legal and political thought which argues most persuasively for the view of regulation taken here.

The implications of this working definition for understanding governmental regulation generally, and regulation by regulations specifically, will now be addressed.

Regulation by Regulations in Canada

No single theory of law, of political behaviour or of economics provides an adequate account of the increasing recourse by governments in the postwar period to forms of visible regulation: the scope of the regulatory enterprise is far greater than classical models encompass; the motives for regulatory activity are too variable to be reduced to a standard explanation; the vehicles and processes of regulation cover the entire range of known social ordering devices; no one calculus of instrument choice offers a complete picture of when any given regulatory initiative should be pursued. Nevertheless, a great deal of insight into the growth of regulation by regulations can be gained by plumbing certain of the presuppositions upon which modern Canadian society rests.

Two related series of questions, already adverted to at the end of the first part, suggest a means of clarifying these presuppositions. At the most basic level one must understand the political dimension of governmental regulation. That is, if there has been an increase in certain forms of state regulatory activity since 1945, to what may this be attributed? Why are the central government and its explicit delegates, rather than the implicit delegates of the state (be these courts or property holders), today perceived as the appropriate agency for the provision of basic social goods and the control of social evils? What circumstances have led to the coalescence of interests necessary to generate changes in the regulatory environment?

The further issue concerns the choice of regulatory vehicle. Undoubtedly, various political and economic models of regulation assist policy makers in evaluating the constraints under which differing instruments must be chosen. But they leave untouched basic questions of legal form, which are, after all, fundamental to institutional design. Why is one particular match of actor, process and sanction preferable to another? What specific virtues of a given legal vehicle does the policy maker hope to highlight or exploit? Under what conditions of social development does one principle of ordering work better than another?

In order to make these two sets of questions about the proper use of any given legal vehicle more manageable and to provide a point of entry to their resolution, a single narrower issue may be framed: What accounts for the apparent proliferation of delegated legislation as a means for implementing regulatory policy?

From at least the time of the Rowell-Sirois Commission in 1940, histo-

rians and political scientists have acknowledged and understood the important regulatory role played by the organized state in the Canadian economy.[66] Of course, over time the objectives of regulation evolved, as government acted first to facilitate the emergence of a national market economy, then to nurture its growth, and now to alleviate its excesses.[67] Concurrently with a change in regulatory objectives, a change in regulatory form occurred. Three developments, each of which requires detailed elaboration, have contributed to the transformation of 20th-century regulatory activity in Canada. First, the "minimalist liberal" viewpoint has displayed a greater vitality in our political culture. Second, "instrumentalist state positivism" has become predominant in Canada's legal culture. Third, lawyers, judges and legislators have come to embrace discursive theories of language, such as logical positivism and common language philosophy.

While these tendencies (or at least their antecedents) may be found even in pre-confederation Canada, they only became predominant in the post-war period. Yet, they have had a major influence on the conception of regulatory alternatives (not to mention the conception of regulation itself) held by both regulators and regulated parties.[68] It remains to place these tendencies in their intellectual context and to find out why their acceptance should lead, almost simultaneously, to an explosion of regulation by regulations and increasingly urgent cries for deregulation.

The Influence of Minimalist Liberalism

Theorists generally acknowledge that Canadian political culture comprises elements derived from divergent traditions. The most influential of these (which today have little to do with political parties of the same names) may be characterized as aristocratic toryism, bourgeois whiggism, minimalist liberalism and egalitarian socialism.[69] Although traces of other ideologies, such as libertarianism, anarchism, Marxism and fascism may be found, these have never managed to attract widespread adherence.

In their archetypal form, the four major political traditions may be differentiated on two intersecting axes. Along an axis reflecting conceptions of state and citizen, these may be divided into essentially non-democratic perspectives such as toryism and whiggism on the one hand, and democratic perspectives such as liberalism and socialism on the other. Here, the expression "democratic" means a commitment to the political equality of citizens *qua* citizens. Along an axis reflecting conceptions of the internal dynamics of society, the "atomistic" and "individualistic" views held by whigs and liberals may be contrasted with "organic" and "communitarian" views held by tories and socialists. That is, these typologies are independent of, and cannot be ranged along, any identifiable left/right political spectrum.

It is not difficult to find examples in Canada of regulatory activity that are paradigmatic to each of these traditions. Surprisingly for some, the

liberal view actually justifies significant government initiatives. For example, the remarkable improvements undertaken in the 19th century to land registration systems, to civil procedure, to bankruptcy, bills of exchange, insurance and sale of goods legislation, and the establishment of regularized currency, the post office and time zones, patent legislation and weights and measures acts, all contributed to the emergence of a market economy. Like the Personal Property Security Act of the late 20th century, these regulatory initiatives were advertised as facilitating efficient economic exchange. A similar regulatory effect was produced by the judicial recognition and enforcement of chattel mortgages and trust deeds, the enforcement of executory contracts and the development of the negligence standard in the law of torts. Thus, both legislative structuring and consolidation, and judicial modification of liability rules, served to enhance the market's efficiency.

By contrast, other governmental activity is more easily understood as a reflexion of whiggism. This tradition has two noteworthy features. First, whigs acknowledge the moral superiority of certain persons to hold leadership positions (in government or the economy) and, consequently, they argue for an economic ruling class. Second, whigs are deferential toward central economic institutions that are designed to encourage the formation of capital and to compensate in part for the perceived anarchy of unregulated supra-national markets. The concession of protected market shares to "worthy" applicants — be these land development companies, railway conglomerates such as the Canadian Pacific Railway, small railway, canal or livery companies, private immigration entrepreneurs, or energy or telecommunications franchisees — reflects this first attribute. A whig perspective may also be seen in the use of the tariff, corporate law and restrictions on entry into banking either to encourage the development of, or to sustain existing but uncompetitive, indigenous enterprise.

But, unlike its analogue in the United States, the Canadian political tradition also has strains of toryism and socialism, which are grounded in organic views of society. These organic views sustain a commitment to values that socialists characterize as ascriptivism (the tendency to value persons for their pedigree rather than their wealth) over values such as achievement.[70] Again, a view of order as a precondition of freedom has tended to mean that the expression "law and order" has, for them, few of the repressive connotations so feared by liberals and whigs. Further, the conception of the state as a social institution not fundamentally dissimilar to the church, the family, the local community or a profession supports a belief in its capacities and its duty to assure the basic needs of citizens. Hence, both tories and socialists show a willingness to employ public enterprise in the development and exploitation of transportation, utilities, energy, communications, financial institutions and so on.

As reflected in regulatory initiative, toryism suggests the use of state power to achieve national purposes and the creation of public intermediate

social structures within which citizens together may pursue the common good. The Crown proprietary corporation (e.g., Canadian National Railway, the Canadian Broadcasting Corporation, Trans Canada Airlines, Ontario Hydro) is thought to be a typically tory initiative. A belief in state education and semi-public philanthropy through the establishment of religion and the creation of workhouses, hospitals and orphanages may also be seen as reflecting tory social perspectives.

Egalitarian socialism is Canada's fourth major political tradition. What distinguishes the socialist perspective from toryism is its commitment to egalitarian distributive measures, such as old-age pensions, unemployment insurance, medicare and so on. For the socialist, these schemes are understood as establishing entitlements that the state should provide without imposing a means test. Not surprisingly, several regulatory initiatives in the 20th century, such as no-fault automobile insurance, workers' compensation, a conciliation model of labour relations, mediational landlord-tenant schemes and equity-dispensing small claims courts, have a distinctively socialist tenor. Each, being grounded in non-market economic beliefs, was designed to oust classical market notions, such as "property as sovereignty," "freedom of contract" and "manifest fault," as well as their legal enforcement institutions (judicial adjudication), from a wide range of social interactions. In other words, where egalitarianism extends to the socio-economic as well as to the political domain, social justice usually cannot be achieved through formal institutions of corrective justice, such as courts.

Apart from the examples already given, it is unnecessary to demonstrate how specific governmental regulatory initiatives undertaken in Canada may find their most plausible justification in one or other of these traditions. Furthermore, only dogmatists would claim that any given legislative or judicial initiative reflects only one of these perspectives; political accommodation will always graft divergent elements onto any piece of legislation. Besides, the principal concern here is slightly different: it is to argue that the assumptions of each tradition tend to be reflected in the legal vehicle (as opposed to the particular substantive program) chosen to effect public policy, and to show how certain vehicles are favoured and others disfavoured within each tradition. The evidence for these latter assertions can be found by examining postwar regulation in Canada since 1945.

Two main legal developments characterize the postwar period. First, many governmental initiatives, originally structured as proprietary monopolies or contractual franchises, or undertaken through an inferior judicial body, have now been transformed into the regulatory tribunal modelled after the American New Deal agency. The evolution of broadcast regulation from the CBC to the Board of Broadcast Governors and ultimately to the CRTC, and the evolution of interprovincial transport regulation from the Railway Board into the Canadian Transport Commission are obvious examples of this transformation. The circumscription of the broad, discretionary powers of local magistrates to regulate sewers,

drainage, line fences, water rights, and so on, and their replacement by specialized executive agencies such as environmental protection agencies and water resources commissions, also follows this pattern. Again, ad hoc governmental decisions to franchise pipeline operations, telephone services and timber concessions have been superseded by the more regularized decision making of a regulatory board.

A second aspect of postwar regulation is that the mechanism of general legislation, prescriptive in structure and theoretically neutral in its beneficiaries, has become the preferred instrument for new regulatory initiatives. In other words, notwithstanding the recent proliferation of Crown corporations, the dominant trend has been toward the creation of regulatory agencies: the introduction of producer-owned marketing boards, the expansion of self-regulating professions, and the development of non-court agencies, such as consumer protection bureaus and landlord-tenant commissions. Even where a formalized regulatory agency is not established, the public policy goal has been pursued almost invariably through legislative rule making, instead of by restructuring the judiciary: the idea of appointing judges like Lord Mansfield to reform the common law from within, or setting up a new court (like the Court of Chancery of old) to mitigate it from without, no longer seems to appeal to Parliament.

Both these tendencies flow from formal corollaries of liberal political theory. A primary concomitant of liberalism is its conception of freedom as the absence of restraint.[71] That is, liberals justify minimalist government because they believe that, in principle, true freedom exists only where the acts of citizens are unfettered by external state limitation. According to this view, governmental regulation is permissible uniquely in cases where restrictions must be imposed to ensure everyone's physical integrity and intellectual autonomy. Not surprisingly, in economic matters this assumption is translated into a conception of market freedom.

A lengthy analysis of alternative conceptions of freedom is hardly necessary to demonstrate the limitations of the above view. To begin with, it assumes that the market exists as a natural phenomenon. This is debatable. While it may be that crude exchange relationships will develop in any community, what distinguishes modern economies is the refinement of their market structure. Several state initiatives have enabled markets to evolve beyond barter. These include the enforcement of executory contracts, the recognition of interests in chattels that do not depend on possession, the encouragement of corporate forms to pool capital, the establishment of currency and its protection against inflation, and the erection of subsidized adjudicative tribunals (courts) to apply these mechanisms. It is precisely the acceptance of the constraints of contract enforcement, private property, business corporations and legal tender that makes the modern market possible. Government regulation here not only facilitates market freedom, it helps create it. The claim that regulation that creates the structural preconditions for effective markets or enhances market effi-

ciency is not regulation rests on the false dichotomy of freedom versus order. Those who assert it have never succeeded in providing a criterion for distinguishing state endeavours that are structural preconditions from those that are inappropriate regulatory interventions.[72]

A second element in modern liberal thinking is the assertion of a natural realm of private autonomy in economic matters. Liberals claim that the sovereignty arising from private ownership is economically legitimate, even where it imposes restraints upon the freedom of others. Conversely, they hold that the exercise of non-proprietary public sovereignty is economically illegitimate, even where it is grounded in democratic political institutions and enhances everyone's general autonomy.[73]

Functionally, of course, there is no difference between a common law rule that vests the proceeds generated by capital in its titulary, and a statute that delegates an exclusive licensing function to an official. The point is even more obvious where private property has a statutory origin (as in copyrights and trademarks) and public sovereignty has a common law origin (as in the granting or withholding of citizenship). With no substantive or procedural restrictions, both owner and official may exercise their sovereignty as they see fit, wielding it over others' sovereignty. Yet in liberal theory one is accepted as a natural consequence of human sovereignty over things, while the other is rejected as an unnatural constraint upon the market. No great insight is required to see that private property is a delegation of public authority. Any student of the law of trusts, wills or intellectual property knows how public regulatory initiative was used first to create and now is used to maintain a structure of private proprietary autonomy. If public regulation therefore creates such "private" sovereignty, why should it be immune from encroachment by competing delegations of public sovereignty?

The third characteristic of liberal political theory is its distinction between structures of reciprocity and structures for pursuing common ends, and the primacy it affords to the former.[74] Liberals hold that, of these two principles of human action and cooperation, government should become involved only in the former. The structuring and policing of bargain, exchange and contract should, as far as possible, remain free from state control. In these "private law" fields, the state should not insinuate principles of distributive justice; only principles of corrective justice, elaborated by adjudicative bodies on a case-by-case basis, should govern.

It is not difficult to identify problems with this view of social relations and legal institutions. While courts and adjudicative bodies always seemed to be merely applying objective, common law rules, these rules have evolved in a remarkable way. When Parliament chose in the 19th century not to legislate to correct deficiencies in the common law, and when it declined to create competing decision-making jurisdictions (administrative tribunals), it was doing no more than accepting judicial regulation as the best means of enhancing an emergent market economy.[75] The false

dichotomy that legislatures make policy and courts do not rests on the equally spurious belief that organization by common ends (distributive justice) and organization by reciprocity (corrective justice) are two mutually independent principles. In fact, corrective justice is a subset of distributive justice in which the fairness of original distributions is assumed.

When these features of minimalist liberal theory are closely examined, it becomes apparent that they offer only a partial explanation of the political state. But it is equally obvious how these postulates produce attitudes toward the forms of economic regulation that place a premium on legislation rather than on property (nationalization), contract or managerial authority as a governmental modus operandi. It is also not difficult to see how they justify a view of the substance of state initiative best encapsulated in the term deregulation.

The Emergence of Instrumentalist State Positivism

In modern discussions of governmental regulatory activity, probably the most praised, most maligned and most misunderstood conception is that of the Rule of Law. In its Anglo-American version especially, it has had a relatively short history. However, its more general manifestation — legalism — has a lengthier ancestry.[76] There are several important facets of legalism, although A.V. Dicey only explicitly formulated three: the principle of legislative legitimation, the principle of judicial independence, and the principle of executive minimalism. While Dicey developed his views in England in the late 19th century, in Canada they reached maturity only in the mid-20th century.[77]

The defects of the Diceyan vision are well known and need not be reviewed. But the assumptions of his special type of Rule of Law thesis are important in explaining how the particular legal philosophy upon which it rests — instrumentalist state positivism — prompts a commitment to regulations as a regulatory vehicle. Once again a trilogy may be identified. Dicey assumed that law is primarily a static common law and that any legal change must occur by means of a specified legal form: made and individuated legislative rules. He also asserted a sharp distinction between law and politics: the objectivity of law is maintained only by compressing all questions of policy into prescriptive legislation enacted by Parliament and applied by impartial courts. Finally, he assumed unfettered parliamentary supremacy: legislation is a mere means, and may be deployed to accomplish any substantive goal. Of course, each of these assumptions requires elaboration, but it is easy to see how together they justify in reverse order the rubric "instrumentalist state positivism."[78]

The thesis that law must be formally made has several corollaries. It implies first of all that regulation is always imposed. In consequence, it results only from explicit regulatory activity, not implicit bureaucratic

behaviour, the will of God or the nature of things. While this view of law is liberating as to legal content (that is, as to the subject matter of legislation), it is restrictive as to legal form. Hence, the common law or the market itself, as forms of assumed or implicit regulation, are not viewed as legal constructs, but are held to be natural and self-legitimating. By contrast, because legislative activity is explicit, it must be formally legitimated through the political process. For this purpose, constitutional, as opposed to economic, equality is a necessary and sufficient condition.

Another corollary of Dicey's thesis that law must be made is that governmental regulation, once legitimated, is thereby made self-executing, regardless of the social context into which it must be projected. How the law is actually enforced, applied and interpreted is held to be irrelevant to descriptions of what the law is. On this view a single regulatory statute, rigorously enforced, produces less regulation than twenty such statutes that are never enforced or are unenforceable.

A last corollary may be derived from Dicey's limited view of legal change. A concern with the pedigree of legal rules usually translates into a relatively clear dichotomy between making and applying rules: for Dicey, the authoritative elaboration of legal rules by the state must be explicit and discrete. Any judicial modification of these rules through interpretation is not law making (a political act), but rather the discovery of the true rule. The reason for the declaratory theory of adjudication is clear. If social context and other events are permitted to shape the law of a political state, then the idea that only parliaments may provoke legal change by specific legislative activity cannot be maintained, and the deep structure of all law is exposed as historically contingent.[79]

These corollaries are aspects of any theory of legal positivism, not just state positivism and, of course, they all stand or fall with legal positivism generally. The same is true of the second element of Dicey's Rule of Law thesis — that there is sharp distinction between law and politics. When this claim is applied to state activity, it generates three aspirational principles. In the first place, Dicey's view requires that government not curtail rights and liberties except through validly enacted parliamentary legislation; that is, legislation transforms essentially political compromise into objective legal form. Second, this view also presumes (although it does not require) that this legislation will be individually normative (that is, that it will be justified by an appeal to principles of corrective justice) rather than institutionally normative (that is, justifiable by an appeal to principles of distributive justice). Finally, it presumes that all legislation will be interpreted by an independent judiciary, conditioned in the ways of adversarial adjudication of private rights. The affinity of political conservatism and Dicey's theory is evident; moreover, when this second theme is rigorously pursued, one sees how market economics and the Rule of Law thesis share a common purpose.

From Jeremy Bentham onwards, English legal theorists have displayed

an increasing preoccupation with legislation. While many view Bentham's strictures as directed only to the common law made by judges, in the hands of Dicey the positivist critique produced its greatest impact upon processes of social ordering that are neither legislative nor judicial. The most important victims of legislative positivism are proprietary and conventional ordering by the state. Whether these regulatory initiatives are pursued through managerial-type processes, the concession of franchises, supply contract requirements, or through minimum performance norms, unless they are grounded in a legislative framework, they are regarded as arbitrary. It follows that for Dicey the formal equality of citizens need not necessarily give rise to substantive equality — be this in the sense of economic entitlement, or in the sense that all human interaction may contribute equally to the direct formulation of legal rules. Only lawmaking mediated by legislative forms can fit his Rule of Law theory.[80]

Dicey's further aspirational principle is acknowledged, even by sympathetic commentators such as McRuer, to be impractical in today's world.[81] The practical demands of administration in the modern state make it unfeasible to enact individually normative legislation only in statutes. Hence the delegation of subordinate legislative powers to bodies (the governor-in-council, ministers, specialized agencies), which then impart individually normative details to statutes which themselves are institutionally normative (i.e., mere shells). But modern legislative activity often necessitates an even greater departure from Dicey's aspirational principle. Political decisions about the inappropriateness of standards of corrective justice across wide areas of the common law underlie the enactment of institutionally normative statutes and even the delegation of institutionally normative powers. These latter statutes typically grant non-parliamentary and non-judicial agencies broad powers to legislate, to manage and to decide. Simply put, delegation of discretions is no more than the response of necessity to legal form.[82]

Nevertheless, because Dicey's theory is a theory of legal forms, almost all recent delegations of institutionally normative powers are consistent with its procedural, if not its substantive, requirements. Both the explicit creation of subordinate legislative power and the erection of statutory tribunals with decision-making functions by Act of Parliament are not objectionable per se. Provided that any discretion so delegated is hedged by a framework of rules, and provided that jurisdictional control by an independent adjudicative tribunal (the ordinary, common law courts) over the validity and detail of delegated legislation or discretionary power is maintained, the formal properties of the Rule of Law survive. In short, from a theoretical perspective, the concept of jurisdiction is the means for subsuming public administration into legalism.[83]

The third and final dimension in the geometry of instrumentalist state positivism is the claim that the prescriptive legal form may be shaped to fit any goal; this is equivalent to an assertion that legislation may be radically

instrumental and coercive. As others have noted, in order for legal regulation to be instrumental, it must operate through rules that are general, stable, prospective, publicly announced and non-contradictory. However, commitment to these desirable formal properties of rule making need not lead one to adapt to an instrumental view of law.[84]

Nevertheless, Dicey's thesis does have two important instrumental features. On the one hand, the claim that law is a means only requires that law making be consciously normative. Rules that arise from stabilized patterns of interaction, bureaucratic hierarchies or precedent are deprecated because, as continually evolving summaries of past events, they are instrumentally less apt.[85] How can law guide a citizen's conduct if it is always in a process of becoming? On the other hand, the Diceyan model is instrumental in its conception of parliamentary supremacy. The argument is that because Parliament is supreme in the constitutional sense, it is also supreme in the material sense: there are no natural limits to what can be legislated. No doubt, Parliament can declare a woman to be a man or establish the value of *pi* as an integer, or even attempt to legislate a regime of fault-based liability rules applicable to multicar pile-ups on a freeway. But what is the systemic cost, and what is the likely result of such legislation? Neither the adjudicative nor the legislative (nor any other legal) form can be bent to solve all social problems.[86]

A thesis about legal coercion may also be derived from Dicey's Rule of Law instrumentalism. The resultant model of legal regulation is captured in concepts such as Kelsen's "the norm stipulating the sanction" or Hart's "duty-imposing" rule. In other words, private "power-conferring rules" do not capture the essence of law; legal rules establish conditions under which predetermined results follow. What is more, public "power-conferring" rules must meet a test of explicitness so that the titulary of the power conferred can genuinely be said to be acting on the basis of the rule. For Dicey, this obligational feature of law requires that legislative texts must be detailed and comprehensive. In his view, a direct connection between norm and sanction is essential in preserving law's instrumental character.[87]

It is not necessary here to explain how scientism, a belief in the necessity of progress, a deprecation of reason in the face of brute force, and the identification of law with the nation state have all contributed to the rise of instrumentalist state positivism.[88] It is sufficient to argue that this legal philosophy sustains a commitment to legislation as the only legitimate instrument of state legal regulation. It also requires governmental activity to take the form of relatively detailed, individually normative legislation or delegated legislation. In other words, the values attendant upon Dicey's model of the Rule of Law place a premium on formal and visible legal instruments.[89]

Linguistic Discursivity and the Precision of Regulatory Rules

The modern addiction to excessive detail in regulatory statutes results in part from political and legal theory. But it is also grounded in certain views of language that have become popular with lawyers in postwar Canada. That is, even in combination, neither a theory of government nor a theory about law and legal instruments completely explains the recent explosion in the number of regulations.

In attempting to gain further insight into this question, one may begin with the observation that even once the decision to regulate has been taken and legislation has been selected as the appropriate regulatory vehicle, policy makers confront a further choice: what is the optimal formulation of the legal rule they will enact?[90] Aspects of this question have already been examined. In the earlier discussion of delegated legislation, it was noted that, theoretically, both statutes and regulations can be cast either in very specific or in quite broad terms. In reviewing the requirements of Dicey's Rule of Law theory, the problem of individually normative and institutionally normative rules was analyzed. Because Dicey's thesis presupposes that all legislation to be applied by bodies other than courts will be narrowly drafted so as to structure, confine and check bureaucratic discretion, already this assumes that detail in legal rules is preferable to broadly drawn delegated powers.[91]

But a resistance to delegating discretion addresses only one element of the problem of legislative precision. For even the most detailed rules may themselves be shot through with imprecise standards such as "reasonable," "convenient," or "efficient." Moreover, the concept of precision does not exhaust the linguistic concerns that the rule maker must balance. An excessively detailed rule may ultimately be incomprehensible or unenforceable. The following examples illustrate the possible range of approaches to rule formulation and suggest why the adoption of any given theory of language will lead to a preference for one or another formulation.

Let us imagine a rule that implements the International System (SI) of weights and measures standards. It might state simply:

1. *All weights and measures must conform to the SI.*

On its face, and apart from the problem of defining exactly what the SI requires in respect of various weights and measures, this rule is clear and precise. Yet it fails to account for circumstances where metric conversion may not be efficient or expedient. Hence, one might reformulate the rule to permit exemptions.

2. *All weights and measures must conform to the SI, except where the minister otherwise determines.*

Of course, such a rule would fail to meet the requirements of the Rule of Law. Besides, it is relatively easy to isolate the major cases where exceptions to metric conversion would be thought desirable. Therefore, the rule could be reformulated in a somewhat more detailed fashion.

3. *Except where reasonable to measure otherwise, where an existing imperial non-exact measuring practice of sufficient antiquity is used, where an established, non-metric, international trade standard exists or where another compelling reason of public convenience and necessity requires, all weights and measures must conform to the* SI.

Here one sees a much more detailed rule, but one which does not eliminate discretion, since terms such as "reasonable," "sufficient," and "public convenience and necessity" colour all exceptions. Moreover, by incorporating a reference to non-legislated norms (e.g., an established, non-metric, international trade standard), uncertainty and complexity result.

A fourth approach, and one that seems most popular today, would require elaborate subdefinition of all terms thought to be ambiguous or imprecise. Taking this tack, the rule could be set out (in part) as follows.

4. *Weights and measures must conform to the* SI, *subject to the following exceptions:*
   - *(i) where it is reasonable to measure otherwise, when reasonableness means:*
     - *(a) the cost of converting equipment exceeds the undepreciated capital cost of measuring equipment, or*
     - *(b) the unavailability of* SI *testing devices makes the* SI *measurement potentially hazardous;*
   - *(ii) where an existing imperial non-exact measuring practice of sufficient antiquity is employed, when non-exact measuring practice of sufficient antiquity means:*
     - *(a) the referent of measure is a term of imperial measurement, but the concept to which it refers is in fact measured by some other standard,*
     - *(b) there is no connection between the practice in question and the defined properties of the imperial measure, or*
     - *(c) the practice is so well established in the industry that it gives rise to other correlative non-exact measures;*
   - *(iii) where an established, non-metric, international standard exists, when an established, non-metric international trade standard means:* . . . [and so on].

It is obvious that even this last approach may be refined further. One need only refer to the Income Tax Act for an example of such a style of drafting. Nevertheless, these different formulations of basically the same rule, and the lawyer's (but often not the client's) preference for the fourth, suggest that current legal thinking rests on an identifiable view of language.

The main elements of this view can be isolated by examining exactly what competing values must be balanced in legislative rule making. Typically, lawyers argue that stability, generality, determinacy, non-retroactivity, comprehensibility and coherence are prerequisites to a legitimate regime of rules.[92] But while these standards define desirable properties of rules, they offer little direction as to the particular formulation which any given rule should take.[93]

Since rules are designed to guide behaviour, they must respond to at least five criteria of efficacy. First, they must be formulated in words that are of sufficient clarity to convey meaning to the relevant community of readers, without the need for formal interpretation by courts or lawyers; in short, they must be intelligible. Second, they must be drafted in language that can be applied to particular cases without undue difficulty or delay; in other words, their meaning must be accessible. Third, they must be written so that their audience can easily adjust its conduct to conform with the rule; they must be realizable. Fourth, the formulation of rules must not be so tendentious that it suggests no justification other than fiat; that is, the language of a rule must be morally felicitous. Fifth, rules must be drafted so as to be neither over- nor under-inclusive; in sum, their language must be reasonably congruent with the underlying policy that they are intended to promote.

Obviously, the best rules are those that attain all these goals, assuming that a uniform standard of measurement could be developed. But frequently these requirements work at cross-purposes. For example, an intelligible rule often will be incongruent (the first formulation typifies this situation); a congruent rule will often be inaccessible (the fourth formulation is of this type); an accessible rule will often not be realizable (the third formulation reflects this problem); or a realizable rule will often not be morally felicitous (the second formulation is a particularly egregious example). Of course, these examples could be multiplied many times.

Given the inevitability of at least some conflicts between these several goals, it is necessary to consider the problem of trade-offs. The criteria must be balanced to arrive at the optimal formulation of any given rule. In this exercise, a calculus of rule efficiency should look to the effect of a rule rather than to its coherence with the imperatives of the Rule of Law thesis. Rates of compliance, costs of rule making, costs of rule application, and policy congruence would be important features of this calculus, as would redundancy (i.e., the capacity of a rule to make itself unnecessary because the conduct it prescribes becomes so generally followed that legal regulation — itself a scarce resource — may then be removed for deployment elsewhere).[94]

But an appropriate balancing of criteria will not be achieved easily since the internal logic of this calculus is itself not immutable. Depending on the objectives of the rule and its intended audience, one may prefer to enact a rule that is very costly and uniformly complied with, rather than

a cheaply administered, often-breached standard. Thus, considerations such as whether a rule is an internal bureaucratic rule or an external rule directed to the general public, whether it is a prohibitive standard or a benefit-conferring one, and whether it is a liability-imposing or a sanctioning norm typically would determine how the trade-off should be made.

The above analysis of rule formulation undoubtedly can be useful to legislative draftsmen. But many Canadian analysts of regulation are preoccupied with other features of rules. Lawyers place primary emphasis on congruence as a feature of regulation and prefer the fourth type of formulation to the third or the second as a means to achieve that congruence. Competing values, such as intelligibility to clients, accessibility, realizability and moral felicity, are invariably sacrificed. In some measure, the legal profession takes the view it does because the costs of failing to achieve these other goals often can be externalized to their clients: the more a rule is framed in the special syntax and vocabulary of lawyers, the easier the lawyer's task. The same is invariably true for regulators too. But now that lawyers are themselves suffering from a failure to achieve these competing goals (masses of detailed, frequently amended regulations; the need to acquire and deploy a specialized non-legal vocabulary), they are beginning to echo their clients' complaints.

The principal reason why lawyers initially prefer the fourth formulation (and do so until the regulatory mass becomes overwhelming) is not, however, because they may reap the benefits of congruence while externalizing the costs. It is rather that their acceptance of Dicey's view of legislation leads them to accept uncritically linguistic theories that identify knowledge with language and that hold meaning in language to be objective, discursive and finite.[95] That is, they believe that detail and definition in drafting and the possibility of literalism in interpretation — all concomitants of these theories — enhance the congruence, predictability and objectivity of legal regulation.

The identification of knowledge with language has an important corollary, which permits proponents of this view to claim linguistic objectivity. This corollary is that language is not merely a representation of reality, but is that very reality. It also follows from the proposition that there can be no knowledge that is not formulated in words; that the key to non-arbitrary regulation is precise statements of legal intention. In other words, the way to ensure objective communication is with a detailed vocabulary that is reducible either to objects or tautologies.[96] Since many terms in regulatory statutes like "public convenience and necessity" or "varied and balanced programming" or "significant economic benefit to Canada" do not meet either reductionist test for objective meaning, they are held to be abuses of legal language unless further defined. Being no more than subjective statements of preference such as "ugh" or "wow," they necessarily are thought to give rise to arbitrariness in decision making.

But all branches of law must frequently address themselves to ideas as opposed to objects. Intention, fault, reasonableness, equity and so on are recurring usages of this type in private law. Unfortunately (whatever may be the case with tangible items), the meaning of ideas cannot be made objective by detailed linguistic formulation: a word is, after all, merely a word. Here, however, is where the second element of the lawyer's view of language comes into play. This is a belief in the perfectability of meaning through recourse to detailed definition. Because law is a professional discipline, its vocabulary is believed to be particularly susceptible of being invested with meanings that may be made objective by definition. That is, legal concepts may be hypostatized (i.e., perfectly defined by words).[97] Since perfection is the correspondence of a thing with its concept, in the regulation of human interaction such a belief can be invoked to support the need for exact definitions of that concept. Ultimately, the commitment to a proliferation of definitions rests on a faith that mere words can render an idea truer: the more you say, the more you mean.[98]

The third corollary of the identification of knowledge with language — the possibility of literalism in interpretation — is, in addition, a concomitant of the first two. For if meaning may be transmitted by carefully defined words relating to detailed statements of facts, then to interpret legal rules can be reduced to an exercise of label reading. This view of interpretation is derived from the formal discursive property of language, namely, its ability to present human experience as a series of discrete and self-contained events. It assumes that legal meaning is finite and non-purposive. No concept of tacit meaning is thought to infuse even label reading.[99] According to this view, generality in language choice, statements of purpose, and the refusal to define exhaustively are held to be no more than invitations to capriciousness in interpretation. The wish to believe that precise language may objectify interpretation is, in fact, a major reason why lawyers prefer the fourth formulation set out above.

For the purposes of this essay, it is unnecessary to demonstrate the weaknesses in the above conception of language; justifiable or not, it has had an enormous influence on lawyers and legislative draftsmen. Furthermore, its consequences for judges are equally important: the more legislative texts are written to highlight discursiveness, the more interpreters of texts are induced to write discursive judgments. If the art of applying rules is to infuse them with meaning greater than the previous most true interpretation had achieved, discursive writing is the literary equivalent of painting by numbers. Discursive texts merely create more discursivity, not more meaning. In the final analysis, the proliferation of detailed legislative instruments arises because both legislator and interpreter believe in the identification of knowledge with language.

It is tempting to view the problem of increased reliance on delegated legislation as merely a predictable consequence of increased governmental regulation. Yet the statistics supporting this thesis are equivocal: at best, all that can be said is that visible regulation has increased in Canada. Moreover, this thesis takes no account of changes in the deployment of visible instruments which do not count as regulation in the classical view. In the 19th century, governments relied primarily on legislation (to set up agencies, grant franchises, or standardize market conditions) and Crown ownership to achieve public policy goals directly; today these goals are also pursued directly through tax deductions, equity participation, direct investments, loans, quotas, guaranteed markets, cartels, the creation of marketable property rights, legislative changes to liability rules, regulated labour pools and the like. Finally, there is no evidence that the proliferation of regulations results from this century's technological complexity and a changed state agenda that includes the control of such technology. One hundred years ago, the "railway completion certificate," the "patent" on Crown land and the "franchise" to exploit timber or water resources involved the state in the regulation of similar technological issues; however, these were resolved not through masses of delegated legislation, but in the detail of an engineer's manual of standards, a registrar's and surveyor's professionally inculcated requirements, and in the procedures of inspectors measuring stumpage or drainage flows.

Nevertheless, the explosion of delegated legislation cannot be dismissed as simply the substitution of one form of explicit governmental regulation by another; it reflects more than an evolution in the deployment of legal means to correspond with a prior theoretical evolution of the kind described in previous sections. Not only would such a view rest on a naive conception of causation as it applies to social relationships,[100] it would also fail to take account of changes in public attitudes toward the role of the state and of pressures brought to bear on governments to restructure the exercise of private power. In other words, along with increased visibility, there has been a net increase in the number and scope of direct governmental initiatives. Whether this means that there has been a substantive increase in governmental regulation is another issue, which will be addressed at length in the next part of this study.

For present purposes, it is sufficient to recall the reasons why regulations have become the preferred instrument of regulation. Minimalist liberal political theory justifies a preference for legislation that sets up schemes of duty and entitlement as a mode of social ordering whenever non-market (i.e., non-judicial) regulation is necessary; the legal theory of state instrumentalist positivism suggests the normative form that such legislation must take; discursive linguistic philosophy encourages a belief in the perfect definability of words and a faith that precision in legislative formulation

can lead to objective decision making. These factors truly are among the generators of the postwar revolution in regulatory form. It remains to be seen if anything short of a theoretical counterrevolution can produce a contraction in the mass of delegated legislation.

The Future of Regulation

Regardless of one's political persuasion, it is difficult not to be pessimistic about the future of governmental regulation in Canada. In the first place, there are few indications that Canadians have any better understanding of the major social forces that have contributed to the growth of government since 1945: most citizens today have even less confidence than in the past in the ability of traditional conceptions of freedom of contract, fault and private property to ensure a fair distribution of society's economic production; Canadian business tends to be more reliant on governmental subsidy and protection than in any previous era; and cultural, environmental and health objectives loom large as social priorities.

Secondly, there is no evidence that the major theoretical perspectives that have contributed to our current conundrum are losing their hold on lawyers and legislators: deregulation theorists posit identical conceptions of state, law and language as do proponents of regulation; lawyers in private practice continue to decry, simultaneously, the phenomenon of administrative discretion unfettered by rules, and the problem of an overload of delegated legislation; and contemporary constitutional developments, such as the Canadian Charter of Rights and Freedoms, are grounded in conventional views about the nature of law and government.[101]

In other words, as long as governmental regulatory initiatives are seen only as ex post facto legislative economic intervention (i.e., as long as the market is thought to be a naturally occurring phenomenon rather than a specific governmental regulatory policy) and as long as recent law school graduates dominate Parliament, the provincial legislatures and the civil service (i.e., as long as legal education is grounded in instrumentalist and positivist conceptions of law), excessive deployment of delegated legislation will remain the predominant regulatory mode in Canada.

Of course, most legal commentators continue to believe that both regulation and regulations can be brought under control through legal forms. The principal suggestions for this exercise will be canvassed below. But it bears repeating that more law does not mean less law; successful treatment of the symptoms of a problem does not imply successful treatment of the problem itself. Moreover, it is hardly a solution to problems of overregulation to replace executive big government with judicial big government through increased commitment to judicial review of administrative action.

The problem to be solved is not really how to control the exercise of state power; rather, it is how to encourage a more discriminating and

responsive use of that power. For it should not be forgotten that deregulation is as much a strategy of government regulation as is delegated legislation itself. In fact, deregulation consists of expanding rather than contracting the scope of uncontrolled regulatory discretion by substituting property owners for state officials as titularies of delegated power, and by deploying the market, as opposed to formalized administrative procedures, as a regulatory process. If and how deregulation should be adopted as a regulatory strategy will be addressed in later sections.

Governmental Growth and Governmental Regulation

So far in this study, the actual phenomenon of big government has not been of particular concern. The focus has been on explaining why there are more regulatory statutes (and especially regulations) today than in 1945. Now, however, it is appropriate to examine the ways in which government itself has grown, for understanding how the tasks of the state have evolved will assist in identifying how the loci of regulation have changed. As one commentator has observed:

> . . . to an extent undreamed of a generation or two ago, governments are regarded by their people as custodians of human welfare in almost all important physical and social respects. To this end, an enormous structure of health, education, housing, social security, welfare, environmental and community services has been created — a structure that affects the lives and property of all. But to administer this structure a huge bureaucracy has also developed, and now in his dealings with the government the citizen is confronted by all types of boards, agencies and departments that have been given extensive powers.[102]

As with the definition of regulation, one factor that complicates analysis is the lack of consensus about what is meant by "government." For the purposes of this discussion, the term government will be understood as comprising all the legislative or decision-making powers granted to an individual within the public service or to an agency by or under a statute or under the Crown prerogative, which affect the rights and privileges of citizens.[103] Here government includes not only the civil service and other administrative agencies (big government), but also the inspector, registrar, commissioner or superintendent (small government) who exercise a specific power granted by statute.

It is common to ascribe this growth of government to such factors as the desire of political parties to increase their power and to provide more jobs for patronage. Such cynicism is hardly justified. Most governmental activity is undertaken in response to electoral pressures (mediated through political parties) as citizens ask the state to assume responsibility for services that previously were either unknown or undesired.[104] In other words, much of the explanation for the growth of government is not grounded

in demands for market regulation; it can be found in changing perceptions of the role of social institutions. At least five general trends may be isolated.[105]

To begin with, as society becomes less parochial, the interaction between its communities becomes more complex and the state is called upon to perform a variety of new public managerial functions. At a time when the family, parish or township was a person's central lifelong social unit, many services could well be left to individual enterprise, and hierarchical coordination between communities was unnecessary. For example, a centralized bureaucracy is hardly required to structure security services, highways, information media, leisure facilities, refuse disposal and so on in communities of 5,000 to 20,000 people. Today, however, the basic unit of social life has become the national or provincial state. With a loss of local focus comes the loss of personal participation in these community projects. The regulation of harbours, airports, roads, hydro and police continues to be exercised by our most important social institution, but that institution is no longer an organism of direct democracy; rather, it is a representative institution — Parliament. Once a pattern of centralized coordination of public enterprise becomes established, it is practically inevitable that any new developments of a public character (regardless of how peripheral they are to social well-being) should be seen as properly governmental. Hence, today, the construction of recreation complexes and sports stadia have become a major concern of the state.

A second factor that has contributed to an expansion in government has been the decline of two voluntary associations which traditionally assumed the burden of providing social welfare services: the family and the church. The expression "nuclear family" accurately describes the former's atrophy. Aged persons, orphans, mental incompetents and the psychologically or physically handicapped are no longer cared for by relatives; elaborate, highly bureaucratized, state-run facilities are now required to provide those services, which previously were organized on an ad hoc basis within the family context. Moreover, the declining impact of the church and the changing focus of religious experience means that today health care, education and welfare are no longer the responsibility of these private associations. When religion loses its social mission (and becomes uniquely a spiritual exercise), its more earthly endeavours wither: sectarian hospitals, high schools and colleges have given way to publicly funded analogues; church-sponsored charities and economic redistributional schemes, such as bazaars and potluck suppers, have by and large ceded their function to various public welfare programs.

A substantial reorientation in our perception of the relationship between capital and labour in industrial society has been a third stimulant to state activity. Whereas notions of private property and freedom of contract came to dominate thinking about the master/servant relationship at the turn of the century (i.e., ownership of capital assets such as land no longer

carried with it a social responsibility to tenants, and the concept of contract was extended to labour), in Canada we now look to government to police the content of the employment relationship (i.e., the state explicitly acts to prevent exploitation in a fashion parallel to implicit — and typically unsuccessful — customary intendments in pre-industrial society). Not only do state agencies supervise collective bargaining, they also control, by means of employment standards legislation, base wage rates, the numbers of hours worked, and occupational safety or health standards. In fact, almost all incidents of a person's labour are now affected by some governmental control. In the apprenticeship period, state commissions run job training and retraining programs; during the work career, other boards operate compensation schemes for industrial accidents and income security pools in the event of unemployment; after active employment has ceased, governments administer various pension plans to provide continuing income.

The declining agricultural base and greater industrialization of Canadian society is a further development contributing to the expansion of government. The more urbanized a society, the greater the division of labour; the denser a community becomes, the greater the need for structures to prevent abuses of the neighbourhood relationship. Sidewalks, sewers, garbage collection, water supply and fire protection are all part and parcel of urban living, and each has now become the responsibility of a full-time government agency. A final offshoot of urbanization has been the greater reliance on explicit contract as a means of acquiring the means of survival and comfort. As contract replaces customary exchange relationships, the potential for unconscionable transactions increases: consumer protection legislation, warranties for new homes, landlord and tenant laws, rent control, registration of travel agencies, inspection of meat and vegetables, testing of drugs and medicines, and so on, are all examples of government supervision of private negotiation.

A fifth general factor that has impelled governments to take on new functions is the realization that a society's resources, both natural and industrial, are limited. This has been a particular concern in primary industries, where the true cost of business can in large measure be externalized. Consequently, direct control over such aspects of the economy by the one social actor incapable of cost externalization has increased; the state is under pressure to control fishing, forestry, energy development and water usage in order to ensure against the pollution or depletion of these resources. Moreover, the national economy is itself seen as a resource to be protected from manipulation from nonaccountable entities such as multinational corporations and foreign states; in this endeavour, government now regulates in even greater detail imports and exports, banking, farm products marketing, land acquisition and interest rates. Inevitably, the demands on the state to doctor the Canadian economy (i.e., to control unemployment, to stop or reduce inflation, to limit interest rates) will lead

to more and more centralized economic planning. The recent creation of foreign investment review and anti-inflation tribunals are examples of how extensive such central planning can be.

Although the above account is, no doubt, an oversimplification, it is undeniable that profound social changes have created a climate within which the modern, all-encompassing state may flourish. While various theoretical assumptions have seduced policy makers into undue reliance on the regulatory statute and delegated legislation as instruments for pursuing state economic initiatives, other social factors have created demands that governments directly regulate various economic activities, rather than delegate broad discretions to "private" parties or the courts within a general regulatory framework. Any general lessons that the experience of the past forty years has taught us about patterns of governmental regulatory policy will be considered below. At that point, a framework for relating the form of regulation to its substance will be advanced. For the moment, however, it is appropriate to return to the question of regulating regulation: How, if at all, can the legal processes of governmental economic activity through delegated legislation be improved?

The Legal Regulation of Regulation: Some Proposals and Problems

As was noted earlier in this study, current strategies for regulating regulation are designed for the most part to impose legal rather than bureaucratic controls. What is more, in view of the theoretical presuppositions upon which they rest, it is clear that they will not bring any improvement to the Canadian regulatory environment. Rather than presage a more subtle and nuanced deployment of state legal instruments, these strategies hark back to the market as a primary regulatory process. Nevertheless, in view of their current popularity, they merit brief consideration.

The most popular proposals for reforming regulation may be divided into four main types: first, *increased supervision* — it is thought that all new regulatory initiatives should be subjected to greater a priori control; second, *deregulation* — commentators claim that the existing regulatory mass should be cut back or allowed to expire quietly; third, *regulatory analysis* — critics argue that the procedures of government regulation should be restructured, humanized and generally softened; finally, *legalization* — it is suggested that ex post facto control by judicial review be facilitated.[106]

There is no doubt that together these initiatives will substantially alter the formal features of Canada's regulatory environment. However, they all presuppose the same restricted view of regulation that was criticized earlier, because what is being subjected to reassessment is simply regulation by regulatory statute regulations, not the total regulatory structure.

Increased supervision Many proposals envision a greater formalization of preconditions to new regulatory initiative. Three constituencies (executive, legislative and regulated parties) and two axes of evaluation (economic, legal) may be identified. First, it is felt that prior executive control, through socio-economic impact assessment and mandatory reference to a regulations tribunal, would ensure the economic efficiency and legal propriety of proposed regulations, if not an actual decrease in the number of new regulatory initiatives. The former process might well produce more cost-effective programs and the latter more technically competent (from a lawyer's perspective) regulations, but the extra layer of bureaucracy is unlikely to be effective in achieving better use of non-legislative alternatives. In fact, if successfully pursued, this strategy may well produce a regulatory structure that actually bites, as opposed to the current situation, where the trade-off for ineffectual substantive regulation is an imposing mass of reporting requirements.[107]

A second theme in prior control involves increasing the role of Parliament in the regulatory process. It is frequently suggested that a standing committee be established, with jurisdiction to monitor the entire process of regulation, to review the policy of individual regulations on their merits and to assess the performance of agencies. But if the model of political rationality is plausible, the more this committee achieves a high profile, the less likely it is to simplify or even forestall regulation. Indeed, it will become a competing political forum with Parliament for the sponsorship of new initiatives.[108]

A final aspect of reforms directed to reviewing new regulation are suggestions for improving consultation with interested groups. It has been proposed that regulators keep lists of interested parties to whom notices may be mailed. In addition, periodic dissemination of future regulatory agendas and the compilation of an index of regulations are advocated as a means of improving access to regulators and to facilitate responsible regulation. A widely recommended complement to these formal procedures is the publication of draft regulations for comment and the holding of public hearings on their advisability. To encourage widespread participation in these consultations, state funding of public interest groups is also thought to be of prime importance. Again, the result of these proposals is unlikely to be reduced regulation. Typically, increased public participation in a political process augments rather than diminishes the volume of the product that the process creates.[109]

Each of these suggestions ostensibly is designed to rationalize the regulatory process and, in particular, the making of delegated legislation; however, in effect, each merely bureaucratizes regulation making even further. A neat irony emerges. While the liberal Rule of Law model of the state originally led to the creation of agencies staffed by bureaucrats who were thought to be politically independent technical experts, most recent proposals have the effect of acknowledging and enhancing the

political character of regulation making.[110] That is, current strategies for controlling new regulatory initiatives likely will do little more than to "parliamentarize" a process originally conceived to overcome dysfunctional elements in that very process. Here, the desire for less formal law clearly will produce more formal law.

Deregulation Proponents of regulatory reform also advance schemes for reducing much of the existing regulatory mass. Many feel that sunset clauses, employed with the Bank Act, should be deployed more frequently. Yet, if anything, the experience of a simple year-by-year extension of the Bank Act, without substantive amendment, shows the limited usefulness of sunset clauses. What is more, the example of the transmutation of the Food Prices Review Board into the Anti-Inflation Board suggests that the impending expiry of an agency mandate often will produce a renewed, and usually even more extensive, definition of its objectives. Where such redefinition fails (and an agency expires), its functions do not disappear, but are merely transferred to another body. Thus, the abolition of the Civil Aeronautics Board in the United States, an agency that formerly controlled price and entry conditions in air transport has simply meant that a priori control is now exercised by federal officers granting loan credits; a posteriori control is imposed by reorganizations authorized in Bankruptcy Court. In these cases, deregulation is simply regulation.[111]

The sale of Crown corporations is another frequently recommended avenue of deregulation. While, strictly speaking, privatization is not deregulation, functionally the result is the same. The sale of Petro-Canada, Canadian National, Air Canada and Via Rail, to suggest only four examples, may initially appear as a shrinkage in government. But the quasi-market competition now provided by these regulatory bodies in all likelihood will simply be assumed by command and control statutory schemes.[112] Moreover, many of the other public policy goals pursued indirectly by Crown corporations would be sacrificed. To take an example that reveals the variety of levels at which regulation through Crown corporations operates, one might ask how the government could implement a policy favouring equal wages for women, non-discrimination, pension plans, buy Canadian, and so on if it could not influence markets indirectly through these corporations.

A further proposal for pruning regulation is for Parliament simply to cut off inspection and enforcement funding to various agencies so as to induce them to make their regulatory coverage more manageable. The basis of this proposal is to apply market principles to regulation, as if it were no more than a consumer item. This idea has a certain appeal, especially to the small businessman who feels overwhelmed when the enormous financial resources of the state are brought to bear upon him in the enforcement of a regulatory policy. But, if anything, reduced budgets would primarily benefit large offenders (who can outlast government) and produce a shift

in enforcement toward minor delinquents. The harassment of small shopkeepers (but not large corporations) by Quebec's "language police" is compelling evidence of such a consequence. Moreover, the chances for ad hoc and discriminatory enforcement are enhanced when enforcement resources are insufficient to monitor all contraventions of regulatory standards. On the other hand, changes in liability rules to facilitate private enforcement, quintupling minimum penalties, and arranging for their payment not to the state but to private prosecutors, as well as other privatizations of enforcement, would expose those being regulated to even greater harassment.[113]

Not all suggestions for reducing the existing stock of delegated legislation envision that the government should abandon the field. It is frequently suggested that studies of the effectiveness of existing programs be undertaken, with a view to substituting self-regulation through guidelines, peer pressure, cartels and even consensus standards. That is, negotiation and consultation with regulated industries and groups is advocated as being preferable to legal imposition of regulatory standards.[114] These proposals are attractive options whose possible implementation will be considered below.

Regulatory Analysis A third, and very popular, direction for regulatory reform is to improve the administration of regulatory schemes. The most frequently mooted structural modifications are better access to information, reduction of the paper burden of regulation, one-window service for government agencies, better consolidation and availability of regulations, flexibility rather than confrontation in enforcement, prior consultation with regulated parties, and public interest group funding.[115] Each of these recommendations is designed to encourage realistic official expectations, to avoid governmental externalization of the costs of regulation and to facilitate the political negotiation of regulatory endeavours on even the most detailed level. All are excellent suggestions which should be pursued vigorously, for all are aimed at improving regulatory bureaucracy from within.

The most radical suggestion for improving administrative procedures would compel regulators to pay the costs of compliance with regulatory standards whenever these add to the cost of doing business. The claim is that if an agency were required to assume the costs necessitated by its rules, it would be more selective, and more reasonable administration would result. In reality, however, what this proposal means is that the cost of regulation would shift from the ultimate consumer of the goods and services being regulated to society generally. Far from being consonant with the general deregulatory theme of "user pay," here regulatory reform actually permits the regulated parties to externalize to all citizens the cost of the benefit that regulation procures for their clients. This externalization is, of course, the standard business tactic to gain a competitive advantage

over those who cannot themselves externalize their costs of market participation.[116]

Legalization A final item on the agenda of regulatory reform is the enhancement of ex post facto controls by way of judicial review. The merits or demerits of this strategy have long been debated and do not require elaborate analysis here.[117] What is worth noting, however, is the conflict of interests that judicial review presupposes. Reviewing courts have never tolerated the same flexibility from administrative decision makers as they do from judicial decision makers. Were one to imagine responsibility for the common law to be vested in a regulatory agency, it would be easy to predict a negative reaction by courts to equitable remedies such as the constructive trust or other policy developments on the one hand, and to an entire body of law developed on a case-by-case basis without any legislative standards on the other.[118] Those who propose enhanced judicial review attempt to subsume the vast array of governmental distributive schemes and programs into a framework of corrective justice. For some curious reason, Canada's present legal system continues to permit dynamic distributions to be evaluated by a static standard. Not surprisingly, those who see markets as natural entities also see the common law as natural; those who see markets as a specific regulatory strategy regard the judicially developed common law as a specific regulatory choice.[119]

The careful analyst will note that several of these recommendations for reforming regulation actually are contradictory. Some are directed to an increased use of traditional legal forms, to structural readjustments and to mandatory procedures (i.e., imposed public ordering); others are directed to greater exploitation of informality, to consensus and to negotiation (i.e., voluntary private ordering). Because critics of regulation are preoccupied with the regulatory statute, they do not see how much present regulation is indirect and informal; nor do they appreciate the rationality of forms of procedural fairness that are not classically adjudicative.[120]

At a more basic level, it is obvious that regulation by the legislature and executive is discouraged, but regulation by the judiciary is encouraged or left intact, either by returning broad areas to the supervision of common law courts (rather than agencies with precise policy mandates) or by enhancing judicial review mechanisms. Most of these proposals will in effect make the courts Canada's principal regulator. Ironically, deregulation theorists overtly argue for such a result without recognizing that asking courts to supervise an "efficient common law" is functionally the same as asking agencies to supervise "common law inefficiencies."[121]

Finally, one notes that most current suggestions presuppose that the liberal Rule of Law model of state activity is capable of sustaining sufficient legal controls to inhibit further growth of the regulatory enterprise. Yet it is nothing other than this same model that has generated the unwanted regulatory environment, comprising excessive recourse to legislation and

litigation.[122] A liberal theory of regulation ultimately generates a liberal theory of deregulation; and this is nothing less than the irresistible force/immovable object conundrum. In effect, current proposals for the control of regulation illustrate how the theoretical perspectives that created today's regulatory environment continue to limit horizons and obscure potential solutions. Apart from suggestions for encouraging alternatives to legislation, such as consensus standards, voluntary regulation and negotiation, and proposals for improving regulatory bureaucracies, such as advance consultation, reduction of paper burden, and flexibility in enforcement, they all presuppose continued use of the statutory form. Delegated legislation and command and control regulatory statutes remain the primary, if not exclusive, instrument by which the new regulation is to be pursued. In this sense, responsible regulation through deregulation is a chimera.

The new regulation also rests on the same false dichotomies — public and private, law and politics, rule and discretion — that sustained its ancestors. In the final analysis, most proposals for the legal regulation of regulation are directed to re-creating a mythology in which private power is benign, markets are efficient (and objective) arbiters of exchange, and initial economic distributions are just. Of course, when confronted with these implications of current proposals for deregulation (including privatization), most proponents retreat to more moderate positions; government should withdraw from those economic sectors which private enterprise can exploit efficiently. Yet, it must be remembered that the achievement of political democracy rests, in large measure, on the substitution of public (and responsible) government for private (and self-legitimating) sovereignty. From this perspective, using public resources to enhance private power in the name of deregulation is paradoxical. Effectively, most deregulation is nothing more than reregulation without a democratic face.

Principles of Human Association; Forms of Social Ordering

The proposition that the creation or the achievement of the political state by any given community or society is a regulatory act is hardly novel in political theory.[123] Yet its implications for regulatory analysis have largely been ignored. First of all, in this view, parliamentary legislation is not seen as the only legitimate means of social ordering by government. Moreover, the modern market economy appears itself as a regulatory creation, and those legal instruments that create or enhance it are revealed as manifestations of public policy making. Further, the establishment of courts (as opposed to some other institution) to adjudicate conflicts is shown to be a specific political choice; that is, the common law may be understood as a delegation of discretionary authority by the state to its courts so as to enble them to work out — on a case-by-case basis over

selected areas of human interaction — the principles of a static model of corrective justice between private parties.

This view of social development also explains why the current vocabulary of regulation has such an idiosyncratic flavour. The development of the common law over the past four hundred years reveals how state regulatory policy produced the legal regime we know today and how jurisdictional pluralism ensured responsive private law by offering litigants competing judicial forums, typically applying differing principles of distributive justice.[124] The 19th century Judicature Acts (and their functional analogue in civilian jurisdictions — codification) thus appear as mechanisms to suppress judicial pluralism and to crystallize a certain conception of the realm of corrective justice. In other words, these legal developments impressed the merely contingent late-19th-century view of the market and economic theory with a false character of necessity, if not permanence.[125]

Once the creation of the market economy and the liberal state are seen in the light of political theory, a good many of the dilemmas posed by 20th-century regulation may be resolved. Two frames of reference may be posited. On the one hand, it is necessary to consider why societies develop increasingly formal and all-embracing politico-legal structures: here one is invited to consider what may be described as the principles of human association. On the other hand, the actual processes by which these principles of association are worked out in human interactions must be clarified: here one focusses on the optimal deployment of various forms of social ordering. Together these complementary lines of inquiry ought to suggest the rudiments of a strategy for reforming regulation.[126]

Certain general conclusions about patterns of social organization can be deduced from an analysis of the five developments reviewed in the first section of this part. For example, the change in locus of a person's deepest commitments from small units, where neighbours are well known, to larger units, where a great deal of time is spent interacting with strangers, also changes the rudiments of social intercourse. This, of course, is the theme Maine was pursuing in his oft-misunderstood thesis that the development of law is reflected in the progressive displacement of status by contract. A subtler version of this claim would be that as unitary social structures disappear (i.e., as a person develops differing circles of interaction for employment, residence, family, religion, recreation, and so on), relationships tend to be less grounded in tacit organization by common ends or purposes and more grounded in explicit reciprocity or exchange. At first, a heightened perception of the importance of negative freedom and formal equality accompanies exchange-based relationships; later, the desire to recapture a sense of community (positive freedom) and substantive equality reasserts itself through claims made upon the single comprehensive institution devoted to the pursuit of common purposes — the state.

The withering of family and church is also reflected in social structure.

Interpersonal relationships are channelled through both voluntary and obligatory associations, with the former typically supplying life's luxuries, both material and spiritual, and the latter supplying life's necessities. The decline of family and church is no more than the intellectual transformation of these institutions from the realm of the obligatory to the realm of the voluntary. When the adult population no longer sees membership in the extended family or the church as obligatory, any basic social functions they previously performed will be off-loaded onto institutions now conceived to be obligatory. For most Canadians, from the age of majority onwards, the state is the only remaining non-voluntary association.

Changing perceptions of the relationship between a person and his labour constitute a third element in 20th-century social development. Before the Industrial Revolution, it was inconceivable that a person could simply sell labour, for the employment relationship also implied a social relationship: master/servant; knight/vassal; farmer/hired man; client/solicitor; patient/doctor; and so on. With the discovery that notions of contract could be applied to labour agreements, a person's capacity for work became little more than a fungible commodity. People became discrete units of production, and "doing one's job" replaced "doing one's best" as a daily objective. A morality of duty (in which minimum standards of performance dictate the content of praiseworthy conduct) replaced a morality of aspiration as the employee's yardstick. For the employer, proper conduct could also be reduced to meeting minimum requirements. No morality of aspiration infused managerial ethics, as workplace safety, pensions, disability insurance, workmen's compensation, and so on, simply became bargainable items.

Urbanization and industrialization carry with them an acute division of labour and, concomitantly, particular forms of legal structure. The less one is able to provide life's basic goods and services for oneself, the more exchange relationships develop. In other words, the growth of the executory contract as a point of nexus between non-merchants is proportional to the number of different persons with whom one must transact on a daily basis. In agricultural communities, relationships defined the scope of exchange: negotiating and bargaining were not explicit, nor did they focus on matters of detail. A contractual relationship was likely to be tacit, general and more in the nature of "Will you be *my* . . . (supplier, buyer, miller, shipper, hired hand)" than explicit, discrete and of the type "Will you . . . (sell, purchase, grind, ship, harvest) *this product*." Of course, the changing approaches to marriage agreements are a perfect mirror of the more general point.

The realization that resources are not limitless gives us a better sense of the problem of externationalization and suggests a fifth shift in the governing principles of social organization. Because markets by nature-encourage externalization, it is thought that the state, as the one institution that cannot externalize an entire economy's costs, should have the authority

to decide within a given economy where the burden of externalization should lie. Economic centralization rests on the premise that all social decisions are polycentric, at least to the extent that a congeries of partial solutions to specific problems is not thought capable of leading to comprehensive solutions to major problems. This, of course, is consistent with the peculiar 19th and 20th century version of progress, in which bigger is better, technology is instrumental, and the opinion of an expert with magic solutions is celebrated. This belief that all problems can be solved, given enough time and money, ignores the frequent human experience that "solutions" merely move the problem elsewhere and that problems most often disappear when they are "solved" by indirection.

These five trends in social structure — from institutions for pursuing common ends to institutions enhancing reciprocity; from competing obligatory associations to a single non-voluntary community; from a morality of aspiration to a morality of duty; from informal, customary exchange relationships to formal and discrete contracts; and from a view of progress as a means/ends dialectic to a view of progress as the achievement of specific solutions — are aspects of a fundamental shift in what may be called a society's organizing principles. Over the past hundred years, we have witnessed the gradual supplanting of an ethic of community and shared commitment by an ethic of individuality and claims of right.

While it is beyond the scope of this essay to present a comprehensive analysis of this shift toward what can be characterized as the legal principle, three of its implications for government regulation should be noted.[127] First, when a society becomes dominated by the legal principle, its members tend to become preoccupied with formalized rules of duty and entitlement: whether it is right or just to act is subsumed in the questions "Is it legal?" and "Do I have the power?" Second, the legal principle generates act-oriented rather than person-oriented structures for judging conduct: with the exception of the law of criminal sentencing, we apply legal norms to demonstrated conduct, and are loath to establish schemes that depend on an evaluation of people as individuals. Third, a shift to the legal principle usually produces an abundance of strict procedural requirements for allocating benefits and burdens: discretion and judgment are devalued, and step-by-step (usually adjudicative) processes proliferate.

Those who yearn for a simpler society, for social relationships bonded in shared substantive goals, will find little solace in the prognosis this discussion offers. For if the experience of the past forty years has had any lessons, surely chief among them is the limited capacity of the state (understood solely as a legal institution) to promote the pursuit of shared commitments. Only where the state also is understood as a social institution do its legal forms lend themselves to the pursuit of a common good other than organization by reciprocity. Re-creating an element of shared commitment in our political life ought therefore to be at the top of any agenda for regulatory reform.

These brief remarks about the principles of human association now permit some consideration to be given to the optimal deployment of the various processes of social ordering. That is, how are the motives that draw and hold people together in any association reflected in the deployment of ordering processes through which their association may be given expression? Conversely, how do the availability and deployment of any given process or processes of social ordering react upon the mix of motives that bonds individuals together in the society making use of these processes? In order to keep the discussion within reasonable limits, these questions will be addressed primarily by resorting to a problem that has been lurking on the periphery of each section of this study: do the specific virtues of the legislative mode (normative statutes and delegated legislation) justify its pre-eminence as a means of achieving regulation in Canada in 1984?

In attempting to provide some answer to this question, it is appropriate to note at the outset that legislation is not itself precisely a process of social ordering; it is rather more an outcome. For it is far from inherent in the concept of rules that they be created by a parliamentary process (which is, in Canada, a process of political consultation). In fact, current suggestions for consensus standards illustrate that rules may also result from contractual (i.e., negotiated) processes.[128] Similarly, customary, electoral or mediated processes of ordering can give rise to rules. What is more, normative requirements may be imposed through simple managerial command, just as they may result from extrapolation of individual adjudicative decisions taken on a case-by-case basis. But what does distinguish legislation as a legal institution from other institutions such as adjudication, voting and contract is that the generation of rules is the principal objective of the exercise. Hence, the province of legislation has two frontiers: first, one must consider when a regime of explicit and formally announced rules should be pursued; and second, it is necessary to develop a theory to justify, in any given case, which process for formally establishing rules is morally preferable. These issues will be examined in reverse order.

Some proponents of deregulation do not argue for the outright abolition of rules, but rather for a restructuring of the process of rule making. The desire to broaden prior consultation reflects an attempt to reduce the instances of managerial and adjudicative rule making and to replace them with consultative, mediational or contractual processes. It is the exact counterpoint to the belief (popular in the 1930s but now discredited) that rule making by experts would produce regulatory efficiency. While the original impetus to regulate by independent agencies arose from the realization that case-by-case adjudication of policy is too inefficient where even the deep structure of a problem is not, in principle, grounded in corrective justice but requires a distributional focus, the modern regulatory process has revealed that the other extreme — normativeness by fiat — is little short of disastrous.

Once it is accepted that consultative, mediational or contractual processes

should generally be pursued in rule making (apart from cases of internal procedural rules or the development of the rule of corrective justice where common law principles are to be applied), one may proceed to an assessment of the province of explicit rules themselves. As a means of pursuing regulatory policy, formally announced rules may be contrasted with ad hoc decisions — which may also result from managerial orders, markets, elections, adjudication or deliberate resort to chance. Explicit rules work effectively where an impersonal conduct-guiding framework is sought and a maximum of individual discretion is desired. They serve to facilitate general patterns of human interaction, but are inefficient when directed at individuals or at specific events. Rules are also not a particularly appropriate mechanism where indeterminate and variable policy objectives are to be pursued, for their efficacy depends on their relative permanence, stability and generality. Rules are, finally, less than an optimal ordering device where positive duties are imposed, for they are administratively expensive.[129]

The regulatory statute and delegated legislation are examples of explicit rule making. Consequently, there are occasions where this form of law can be quite effective, and situations where it loses its value. Of course, to ascribe limits to the cases where legislation is desirable does not mean that any given regulatory problem is incapable of resolution through formally announced rules (or, for that matter, through any other legal form). Rather, it suggests that where legislation is projected into inappropriate domains, either the specific virtues of the legislative mode are lost or the basic relationships in that domain are transformed in order that the legislative mode is not rendered incoherent. In other words, each different legal form and process has its own means/ends dynamic, which infects the social relationships it regulates.[130]

An example of how recourse to formal legislation implies a particular means/ends relationship can be drawn from the field of consumer sales and sales financing. The law of conditional sales at the outset of World War II was a very different law from that which prevailed in 1500. The common law courts took a long time to develop the theory that a person could assert a legally protected interest in movable property that he or she had voluntarily put in the possession of a third party. In other words, the separation of title and possession (and the theory of title itself) were specific regulatory achievements that did not come without resistance from non-mercantile interests. In part a response to needs of an emergent market economy, in part justified by the intellectual rationalism of the 18th century, these changes in legal doctrine were evolved from the case-by-case adjudication of specific disputes.

Yet once the courts recognized the concept of non-possessory title in movables, further judicial development of the law seemed to stop, as a new Benthamite theory of the common law, dominated by precedent, took root. The burden of further development thus devolved back to Parliament,

which, not having adjudication as a process of ordering within its means, was required to deploy explicit legislation. Not surprisingly, parliamentary attempts to mitigate the consequences of the arrested development of title in certain cases were seen as an assault on the declared common law. For example, legislation that prevents a seller from accelerating payments and repossessing goods is characterized as regulatory interference. How different our responses would be if the courts had not abdicated their responsibility and had worked out a rule similar to that which prevents a mortgagee from arbitrarily asserting his title against the mortgagor. What is more: how different the rule would have been had it evolved as a summary norm rather than as a prescriptive norm (that is, a rule of practice).

A further illustration of the point may be seen in the development of a theory of executory contracts from the rudiments of *assumpsit*. Modern consumer protection legislation which mitigates the *pacta sunt servanda* rule in consumer contracts is seen as regulation: a common law rule to the same effect would not provoke similar responses, as public policy rules relating to the unenforceability of contracts of slavery attest. The pronouncement of legal norms by courts, buttressed by the declaratory theory of the common law, invests the law so pronounced with a perceived objectivity that is denied to legislation. The same is true of codified law, except that, instead of low-level norms undergoing constant reinterpretation, the legal change ocurs within the context of unchanged high-level norms, whose interpretation and application "is left to the discretion of the judge." In both cases, statutes and regulations are thought to be essentially evanescent judgments of a political nature. Whenever they impinge upon the static concepts of corrective justice, such as fault, private property and freedom of contract as worked out in non-legislative contexts, they cannot attract the same justificatory arguments as common law rules.

These observations lead to a final point. If processes of social ordering (including markets) are not radically instrumental (that is, if they cannot be deployed with equal success in all circumstances), then responsible regulation depends on achieving an appropriate match of substantive goal, principle of association and ordering process. Which is to say that governments should treat the entire body of legal forms and materials exactly in the manner that the pre-Judicature Act courts treated the common law — not as a fixed manifestation of perfection, but as a body of law always in the process of becoming.

Regulation Reconsidered

One observer of present-day American political and legal developments has captured the essence of the regulation debate in three brief sentences:

> First we had market failure; so we tried regulating markets. Then we had regulatory failure; so we tried reforming regulation. Now, it seems, we have "reform failure."[131]

The lesson of the past twenty-five years of regulatory reform in the United States is quite simple: there are no easy solutions to the problem of regulating regulation. In fact, the most obvious consequence of recent initiatives has not been an improvement to the regulatory process, but rather its extreme politicization. Instead of being expended on regulatory creativity, flexibility and responsiveness, scarce agency resources now are often deflected to counteract high level political lobbying. What is more, because critics of regulation invariably reject the idea that regulatory structures themselves function as markets where "invisible hands" may operate,[132] proposals for reform are usually non-bureaucratic, but structural. Ironically, at the same time as they decry regulation, because it rests on the naive belief that it is possible simply to order what is broken to be fixed (market failure being the sign of a "broken" market), deregulation theorists also fall victim to this trap. Regulation, they say, is broken; it needs to be structurally reformed.[133]

In the deregulator's ideal world, the procedures for and calculus of regulatory choice would be relatively straightforward. First, identify the fields where markets can work successfully; then regulate your economy into the most efficient market structure in those fields.[134] Second, identify where market failure exists, (i.e., where some non-market mechanism could reduce market transaction costs); then find the appropriate match of regulatory remedy to type of market failure.[135] That is, of all the available types of state regulatory mechanism — markets, various modes of classical "command and control" regulation, taxation, subsidy, disclosure, liability rules, nationalization, bargaining, marketable property rights — the policy maker simply selects that which is most economically efficient. Of course, in order to preserve the presumptive preferability of regulation by market, most present-day critics of regulation commence their analyses not with a justification for markets but with a discussion of market failure.[136] In this way, non-market regulation can always be stigmatized as an extraordinary political option that is legitimate only in very special circumstances.

While it is relatively easy in the abstract to plot the policy maker's task, deducing a theory of instrument choice is considerably more difficult. One promising recent attempt (even if it does start with an assumption that markets are the optimal regulatory instrument) was undertaken by Breyer, who develops a table that matches regulatory ends and means (i.e, specific instances of market failure to specific modes of regulation).[137] For the problem of natural monopoly, recommended responses are cost-of-service rate making and nationalization. For rent control or the prevention of excess profits, taxation and deregulation are suggested. For spillover difficulties, Breyer argues for the creation of marketable property rights and the negotiation of standards. Where excessive competition is perceived as the source of market failure, deregulation and markets policed by antitrust norms are advocated. If inadequate information is the problem,

disclosure, screening and bargained standards are the suggested solution. Finally, in other cases, such as moral hazard, paternalism and unequal bargaining power, the appropriate match would be incentive-based regulation. Of course, Breyer is careful not to claim that these matches are definitive, but he does deploy them to propound three maxims of obvious regulatory mismatch: price and entry controls should not be used to control excessive competition; nor should they ordinarily be used for purposes of rent control; nor are they able to deal comprehensively with spillover problems.

This analysis clearly illustrates the problem of regulatory reform. Just as it is possible to develop a theory about how the basic structure of society has evolved in such a way as to stimulate claims upon the state for greater provision of goods and services, and just as it is possible to speculate about how diverse legal forms are means/ends complexes, revealing differing moral attributes, so too it is possible to generate a taxonomy of preferred regulatory responses. In other words, optimal public policy making depends on integrating the counsel offered by each of these methods of analysis.

It is, of course, not the purpose of this paper to make proposals for specific deregulatory initiatives; however, three examples will be offered to illustrate the approach that the analysis advanced here would suggest. Suppose the object of regulatory reconsideration were Workmen's Compensation. One might well choose to abolish the existing commissions if injured employees were given a right to collect directly from their employers without having to prove fault, and employers were required to carry adequate liability insurance. Again, much regulation of labour standards could be repealed if corporation law were restructured to permit all employees to capitalize their labour into shares and exercise control over a company's future. Finally, it is obvious that most provisions in consumer protection statutes would be unnecessary if merchants were given no cause of action for any contract worth less than, say, $10,000. In each of these cases, the need for a legislative overlay of regulation upon the common law could be eliminated simply by modifying the structure of delict, property and contract that creates the problem in its basic form. Much so-called deregulation could be accomplished expeditiously by this type of market deregulation.

Yet these suggestions are not without their costs. For example, do they commit us to a further erosion of shared commitment in our political culture? Do they require transformations of the social relationships they govern, that are out of proportion to the benefit they generate? In other words, to understand the true potential for regulatory reform, it is necessary to begin by hypothesizing a social *tabula rasa*, where there are no markets, no courts, no explicit legal rules, and no administrative agencies.

However powerful an engine for political and social development economic efficiency may be, political theorists have never adduced it as

the dominant justification for the political state. Typically, other values such as justice, fairness, equality and liberty preoccupy philosophers.[138] That is, both "markets" and "price and entry controls" are political commodities. Our choice is not between free markets and regulated markets. It is between various strategies for economic regulation where the market is only one option.[139]

Conclusion

It is now opportune to bring together the various strands of the argument canvassed in this essay. The argument may be restated as a series of six propositions about law and government.

First, once regulation is seen as any activity of the state that affects the economic behaviour of citizens, it is apparent that the range of regulatory instruments is vast. These include subsidy, taxation, disclosure, nationalization, price and entry controls, changes to liability rules, the creation of marketable property rights, and even the selective subsidization of dispute resolution institutions such as courts. The "free market" is a specific regulatory choice which is the product of very sophisticated state initiatives designed to recognize and enforce rights in property, as well as to facilitate their identification and exchange.

Second, the sum of regulation in any given economy is a constant; what vary are the degree of centralization of regulation, and its instrumentalities. Over the past hundred years regulation has become more direct and more centralized, as governments have fettered the previously wider regulatory discretion delegated to property holders. What is more, over the past century informal and more ad hoc regulatory strategies have been transformed into more bureaucratic and regularized strategies. The regulatory statute and, to a lesser degree, the Crown corporation, have proliferated.

Third, the growth of centralized and formal regulation may be attributed to the shift in the basic assumptions of Canadian society away from a principle of shared commitment and toward the legal principle. This is reflected in the weakening of intermediate social structures (the family, the church, the community); the pre-eminence of explicit contract over informal, customary exchange; the evolution of moral evaluation toward a morality of duty; and the development of a concept of progress as perfection. In societies dominated by the legal principle, uniformity, explicitness, coordination and centralization are high-order values.

Fourth, the choice of the regulatory statute and regulations as a vehicle for achieving this centralized regulatory coordination flows in large part from widely shared conceptions of the state, the law and language among lawyers and politicians. These conceptions together argue for legislation as the only legitimate instrument of state activity, and for detail in legislative instruments as the only way of ensuring objective and non-arbitrary regulation. Enacting masses of delegated legislation is thought to be the

only way to achieve the necessary degree of explicitness while preserving the legislative legitimacy of state action.

Fifth, advocates of deregulation (and privatization) invariably assert distinctions between public and private economic activity, between law and politics, and between rules and discretion, as a means for arguing the natural legitimacy of the "free market." But since markets are not natural phenomena, deregulation is, in essence, reregulation where the delegates of regulatory power (the holders of publicly created and protected property rights) are not subjected to due process controls over the exercise of their delegated discretion.

Sixth, the public policy choice is not between free markets and regulated markets. It is between various strategies for economic regulation where the "free market" is only one regulatory option. The public policy choice is to find the right match between the values of democratic government (justice, equality, freedom), economic efficiency, and legal instrument. No single one of these terms can be invoked as the standard against which all others should be measured. The balance between them is undoubtedly sub-optimal today in Canada. But the appropriate response is not simply reregulation by widespread deregulation; it is rather redeployment of all our regulatory instruments to further the broader political aims of the Canadian state. While deregulation may be among the strategies for achieving the state's objectives, it is worth repeating that no one regulatory vehicle, least of all the market, is a panacea.

This last point suggests a broader theme. Law, like the state, is more than a system of rules and offices. It is a symbol; it is an achievement which reflects the aspirations of the society out of which it has arisen. The political state is but one mechanism for legitimating law; the law (legal ordering) is but one way of legitimating the political state. Legal forms and processes are among the most important lenses through which a society expresses itself, renders articulate its deepest concerns and values, and orchestrates debate about life's most profound questions.[140]

In other words, law is not simply a means to other ends; it is also an end in itself. As such, it can be a surrogate for power, hate, prejudice, poverty or alienation, or it can be a surrogate for freedom, equality and justice. How we deploy law to address these ideas betrays how we see ourselves. How we discuss law does the same. In Canada today we could be debating important issues such as whether the state should attempt to achieve social or economic justice; instead we talk about regulation and regulations, about markets and efficiency, about deregulation and privatization — all questions of very little lasting concern.

It follows that once regulation as such has become a preoccupation, it is no longer worth discussion.[141] But an initial consideration of regulation and regulations can also give us a point of entry for addressing more important questions. In recognizing this fact, this Royal Commission will no doubt fulfil the therapeutic role it has been assigned.

Notes

This paper was completed in August 1984. It was, however, slightly revised in June 1985 to take account of developments such as the Supreme Court decision in the *Manitoba Reference*.

It should be noted that, to conform to Commission page-limit guidelines, the first three sections of this essay have been substantially abridged. Since literature on the rudiments of regulation is so extensive, footnotes throughout have been kept to a minimum. Supplementary references can be found in the notes to most of the studies here cited.

I wish to thank my research assistant, Marc Barbeau, for his bibliographic help in the preparation of this study. I also thank John Meisel of Queen's University and Brayton Polka of York University who read and commented extensively upon an earlier draft. None should be held accountable for any opinions expressed in the study.

1. One of the major problems which this study attempts to address concerns the confusion between multiple senses of the term regulation. In one sense, almost invariably when used in the plural, the expression "regulations" is used as a synonym for delegated legislation, or subordinate legislation, even if technically speaking their meanings are not identical. Used in this sense, a regulation is, broadly speaking, an enacted legislative instrument made by a body upon whom Parliament has delegated authority to make rules under a statute. A working definition of a "regulation" in this sense is set out in the subsection "The Nature of Delegated Legislation," and the part titled "A Legal Analysis of Delegated Legislation as a Regulatory Vehicle" is devoted to exploring the various attributes of regulations.

   In a second sense, regulation refers to a particular kind of governmental control of the economy. It may be distinguished from other governmental programs for directing the economy such as taxation, subsidy, nationalization, and so on. For a discussion and definition of regulation in this sense, see the part titled "What Is Regulation?"

   A final meaning of regulation is regulation as a generic term for all forms of governmental economic activity. It is this sense of regulation which is intended by the usage in the second word of the title of this study. The third part of the study elaborates this meaning of regulation.

2. In addition to the studies cited *infra*, see G.B. Doern (ed.), *The Regulatory Process in Canada* (1978); C. Brown-John, *Canadian Regulatory Agencies* (1981); Ontario Economic Council, *Government Regulation: Issues and Alternatives 1978* (1978); R. Schultz, *Federalism and the Regulatory Process* (1979); W. Stanbury, *Regulatory Reform in Canada* (1982), *Government Regulation* (1978), and *Regulating the Regulators* (1982); W. Stanbury (ed.), *Studies on Regulation in Canada* (1978). There is also an overwhelming mass of periodical literature.

3. For historical perspectives on regulation in the second sense, see C. Baggaley, *The Emergence of the Regulatory State in Canada, 1867–1939* (1981); T. McGraw (ed.), *Regulation in Perspective: Historical Essays* (1981); M. Priest and A. Wohl, "The Growth of Federal and Provincial Regulation of Economic Activity, 1867–1978," in W. Stanbury (ed.), *Government Regulation: Scope, Growth, Process* (1980), at p. 69.

4. See, for example, E. Henderson, *Foundations of English Administrative Law* (1963). For an explanation of how legal forms can remain constant even while their social function changes, see K. Renner, *The Institutions of Private Law and Their Social Function* (2nd ed.) (1949).

5. See Economic Council of Canada, *Responsible Regulation* (1979) (An interim report), at p. 9ff. and Table B2–5, at p. 125; Law Reform Commission of Canada, *A Catalogue of Discretionary Powers in the Revised Statutes of Canada 1970* (1975). See also R. Barbe, *La réglementation* (1983), at pp. 248–49 and Table 2, at p. 252.

6. See M. Trebilcock *et al.*, *The Choice of Governing Instruments* (1982), at p. 21ff. See also Hays, "Political Choice in Regulatory Administration" in McGraw, *supra*, note 3, at p. 124. A particularly subtle version of the political rationality model is elaborated in J. Wilson (ed.), *The Politics of Regulation* (1980), at p. 357ff.

7. See *infra*, Part V, "The Future of Regulation" and H.W. Arthurs, "Law as an Instrument of State Intervention" in *Law, Society and the Economy*, volume 46 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).

8. See Economic Council of Canada, *supra*, note 5, at p. 44ff.; W. Stanbury and G. Lermer, "Regulation and the Redistribution of Income and Wealth" (1983), 26 *Can. Pub. Adm.* 378.
9. See S. Breyer, *Regulation and Its Reform* (1982), Chapter 1.
10. This point emerges most forcefully in R. Posner, *The Economics of Justice* (1981). See also R. Litan and W. Nordhaus, *Reforming Federal Regulation* (1983), at p. 4; and M. Weidenbaum, *Business, Government and the Public* (2d ed.) (1981).
11. See Economic Council of Canada, *supra*, note 5, at pp. 46–49.
12. See the suggestions made in the symposium on "The Limits of Government Intervention" (1983), 26 *Can. Pub. Adm.* 159.
13. By "legislation," I mean those statutes that impose normative requirements, as opposed to others that are simply the means by which different regulatory forms, such as Crown corporations, are created.
14. See, generally, Barbe, *supra*, note 5. See, federally, *Interpretation Act*, R.S.C. 1970, c. I-23, subsec. 2(1); *Statutory Instruments Act*, S.C. 1970–71–72, c. 38, subsec. 2(1)(d); *Statute Revision Act*, S.C. 1974–75–76, c. 20, subsec. 11(3). See also *Regulation Act*, R.S.B.C., c. 361, s. 1; *Regulations Act*, R.S.A., c. R-13, subsec. 1(1)(f); *Regulations Act*, R.S.M. 1970, c. R60, subsec. 2(1)(f); *Regulations Act*, R.S.S. 1978, c. R-16, subsec. 2(1)(c); *Regulations Act*, R.S.O. 1980, c. 446, subsec. 1(d); *Regulations Act* R.S.N.B., c. R-7, s. 1; *Regulations Act*, C.S.N.S., c. R-12, s. 2(g); *Regulations Revision Act*, Stats P.E.I., 1975, c. 84, s. 2(b); *Statutes and Subordinate Legislation Act*, S.N. 1977, c. 108, s. 10(e).
15. See, for example, *Martineau v. The Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R., 118; *M.N.R. v. Creative Shoes Ltd.*, [1972] F.C., 993. See also, generally, Barbe, *supra*, note 5, at p. 17ff.
16. See Special Committee on Statutory Instruments, *Third Report* (1969) (House of Commons), at p. 14 [hereinafter referred to as "the MacGuigan Report"]. See also Barbe, *supra*, note 5, at pp. 35–39; P. Garant, *Droit administratif* (1981), at p. 284ff.
17. See, generally, G. Pépin and Y. Ouellette, *Principes de contentieux administratif* (2d ed.) (1982), at p. 119ff.; Garant, *supra*, note 16, at p. 296ff.
18. See Pépin and Ouellette, *supra*, note 17, at p. 90 and p. 106ff.
19. *Ibid.*, at pp. 88–90 and p. 125ff.
20. See Pépin and Ouellette, *supra*, note 17, at p. 91; Second Commonwealth Conference on Delegated Legislation, *Report of the Conference: Volume 1* (1983), pp. 15–17 [hereinafter *Report of the Conference*].
21. For an elaboration of these themes, see the MacGuigan Report, *supra*, note 16, at p. 4. See also Arthurs, "Regulation-making: The Creative Opportunities of the Inevitable," [1970] *Alta L.R.*, 315; and Royal Commission, *Inquiry into Civil Rights: Report No. 1* (1968), vol. 1, at p. 335 [hereinafter "the McRuer Report"].
22. See, for example, Standing Joint Committee of the Senate and of the House of Commons on Regulations and Other Statutory Instruments, *Second Report* (1976–77) and *Fourth Report* (1980).
23. See Special Committee on Regulatory Reform, *Report* (1980) (House of Commons); *Report of the Conference*, *supra*, note 20.
24. See MacGuigan Report, *supra*, note 16; *Report*, *supra*, note 23; *Second Report* and *Fourth Report*, *supra*, note 22; Commission d'étude sur le contrôle parlementaire de la législation déléguée, *Le contrôle parlementaire de la législation déléguée* (1983) (Quebec National Assembly); *Report of the Conference*, *supra*, note 20, McRuer Report, *supra*, note 21, at p. 333ff.; Barbe, *supra*, note 5.
25. See R. Risk, *Lawyers, Courts and the Regulatory State* (1983) (unpublished paper). See also R. Macdonald, "Big Government and Its Control: Legislative Initiatives of the Past Decade" in J. Menezes (ed.), *Decade of Adjustment* (1980).
26. See, for example, *Federal Court Act*, S.C. 1970–71–72, c. 1; *Statutory Instruments Act*, S.C. 1970–71–72, c. 38; *Statute Revision Act*, S.C. 1974–75–76, c. 20; *Judicial Review Procedure Act*, R.S.O. 1980, c. 224; *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484; *Code of Civil Procedure*, R.S.Q., c. C-25, arts 33 and 834–61.

27. With respect to these questions, see *supra*, notes 22, 23 and 24.
28. See *Second Report* and *Fourth Report*, *supra*, note 22.
29. See, generally, Barbe, *supra*, note 5, at p. 255ff. Some recent U.S. proposals build on the perceived advisability of centralized control bodies and economic screening criteria: see Litan and Nordhaus, *supra*, note 10.
30. See D. Mullan, *Rule-Making Hearings: A General Statute for Ontario*? (1979) (Research Publication 9; prepared for the Commission on Freedom of Information and Individual Privacy).
31. See Jacoby, "Doit-on légiférer par généralités ou doit-on tout dire?" (1983), 13 *R.D.U.S.* 225. See also Barbe, *supra*, note 5, at p. 91ff.
32. See *infra*, subsection "Delegated Legislation in Perspective" and section "The Future of Regulation," for an evaluation of the legalization of delegated legislation.
33. See R.A. Macdonald, "Absence of Jurisdiction: A Perspective" (1983), 43 *R. du B.* 307; "Judicial Review and Procedural Fairness in Administrative Law" (1980), 25 *McGill L.J.* 520; 26 *McGill L.J.* 1. For the origins of judicial review, see Henderson, *supra*, note 4; A. Rubinstein, *Jurisdiction and Illegality* (1965), and *On the Origins of Judicial Review* (1964). A general treatment of judicial review may be found in Pépin and Ouellette, *supra*, note 17, at pp. 81–138.
34. See Pépin and Ouellette, *supra*, note 17, at pp. 120–23.
35. For an elaboration, see *ibid.*, pp. 124–37.
36. See McRuer Report, *supra*, note 21, at pp. 342–43, for a criticism of this tendency.
37. See, *supra*, note 22.
38. This inclination is particularly evident in the *Fourth Report*, *supra*, note 22, in Barbe, *supra*, note 5, and in the *Report of the Conference*, *supra*, note 20.
39. See *supra*, note 23.
40. See Economic Council of Canada, *Reforming Regulation* (1981). See also Barbe, *supra*, note 5, at pp. 229–33 and 262ff. For a particularly apt criticism of the potential effect of certain types of "regulatory reform" on regulatory policy, see C. Diver, "Regulating the Regulators" (1984), 132 *U. Pa. L. Rev.* 1234 at p. 1252 ff.
41. See Stanbury and Lermer, *supra*, note 8, at p. 380, fn. 3. See also Economic Council of Canada, *supra*, note 5, at p. 43.
42. For a similar conclusion, see G.B. Doern, "The Canadian Regulatory Process," in Doern, *supra*, note 2, at p. 1.
43. For elaboration of the points raised in the next three paragraphs, see R. Dussault, *Traité de droit administratif canadien et québécois*, tome I (1974), at pp. 27ff., 156–69, 241–42, 262, 418–21 and 1006.
44. Even on the most conservative approaches to the theory of judicial decision making, such as that set out in H. Hart, *The Concept of Law* (1961), Chapter VII, the impossibility of slot machine jurisprudence is acknowledged.
45. See, for instance, Green, "Agricultural Marketing Boards in Canada: An Economic and Legal Analysis" (1983), 33 *U.T.L.J.* 407.
46. See C. Lindblom, *Politics and Markets* (1977), Chapters 12–17.
47. See Abel, "The Dramatics Personae of Administrative Law" (1972), 10 *O.H.L.J.* 61.
48. For explicit recognition of this point, see *Bank of Montreal v. Guaranty Silk Dyeing*, [1935] O.R. 493 (C.A.), at p. 506. On the more general point see M. Cohen, "Property and Sovereignty" (1927), 13 *Cornell Law Quarterly* 8.
49. See K. Winston (ed.), *The Principles of Social Order* (1981) (selected essays of Lon Fuller).
50. See Macdonald, "A Theory of Procedural Fairness" (1981), 1 *Windsor Yearb. Access Justice* 3.
51. A thorough analysis of this question may be found in H. Hart and A. Sacks (ed.), *The Legal Process: Basic Problems in the Making and Application of Law* (1958) (unpublished).
52. For a similar conclusion in the private sphere, see M. Eisenberg, "Private Ordering

Through Negotiation, Dispute Settlement and Rule-Making" (1976), 89 *Harv. L. Rev.* 637.

53. See L. Fuller, "The Forms and Limits of Adjudication" (1978), 92 *Harv. L. Rev.* 353 and "Collective Bargaining and the Arbitrator," [1963] *Wisc. L. Rev.* 3.
54. This point is argued in detail in M. Eisenberg, "Participation, Responsiveness and the Consultative Process" (1978), 92 *Harv. L. Rev.* 410.
55. For such a view, see G. Reschenthaler, "Direct Regulation in Canada: Some Policies and Problems" in Stanbury, *Studies on Regulation in Canada*, *supra*, note 2, at p. 37.
56. For an analysis of the range of regulatory sanctions, see Law Reform Commission of Canada, *Sanctions, Compliance Policy and Administrative Law* (1981).
57. See the case studies in Stanbury, *Studies on Regulation in Canada*, *supra*, note 2; Ontario Economic Council, *supra*, note 2; Doern, *supra*, note 2. See also R. Easterbrook, "Criminal Procedure as a Market System" (1983), 12 J. *Legal Studies* 289.
58. The views of John Clifford, expressed at the annual meeting of the Canadian Association of Law Teachers, administrative law section, on May 30, 1984 are representative. For an early attempt to elaborate this perspective, see Clifford's draft paper, *Compliance in Administrative Law* (1984) (unpublished). See also C. Diver, "A Theory of Regulatory Enforcement" (1980), 28 *Pub. Policy* 257.
59. See J. Galbraith, *The Anatomy of Power* (1983) for the origins of this trifurcation.
60. See C. Schultze, *The Public Use of Private Interest* (1977).
61. See U.S. Senate Committee on Government Operations, *The Regulatory Appointments Process*, vol. 1 (1977) (Study on Federal Regulation), at p. v. See also D. Hartle, *Public Policy Decision Making and Regulation* (1979), at p. 1; U.S. Domestic Council Review Group on Regulatory Reform, *The Challenge of Regulatory Reform* (1978) (Report to the President), at p. 43.
62. Typical is M. Priest, W. Stanbury and F. Thompson, "On the Definition of Economic Regulation" in Stanbury, *supra*, note 3, at p. 1.
63. This point is noted in Buhler, "The Origins and Costs of Regulation" in G. Hughes and E. Willams (ed.), *The Dialogue That Happened: Proceedings of Workshops on the Private Costs of Regulation* (1979), who states on page 46, that regulation "should be defined as any activity of government which directs or substantially influences a specific course of action by persons outside government as a means for achieving government's goals."
64. These are hinted at by Mitnick in "The Concepts of Regulation" (1958), 53 *Bulletin of Business Research* (no. 5) 1. He is one of the very few commentators to consider systematically the definition of regulation. See also American Bar Association, Commission on Law and the Economy, *Federal Regulation: Roads to Reform* (1978) (exposure draft).
65. See, for example, W. Stark, *The Social Bond* (1976); R. Unger, *Law in Modern Society* (1976); J. Fishkin, *Tyranny and Legitimacy* (1979); I. Jenkins, *Social Order and the Limits of Law* (1980); V. Aubert, *In Search of Law* (1983).
66. See Baggaley, *supra*, note 3. See also *Report of the Royal Commission on Dominion-Provincial Relations* (1940), Book 1: "Canada: 1867–1939" [hereinafter Rowell-Sirois Report]. A similar role was played by courts in shaping liability rules in the laws of contract, tort and property to meet the needs of the national economy. For international perspectives on this point, see P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979); G. Gilmore, *The Ages of American Law* (1977); and D. Kennedy and F. Michelman, "Are Property and Contract Efficient?" (1980), 8 *Hofstra L. Rev.* 711.
67. For a like analysis in the United States, see M. Horwitz, *The Transformation of American Law* (1977).
68. See H. Aaron, *Politics and the Professors* (1978), for a study of how lawyers' values shape regulatory policy.
69. See G. Horowitz, *Canadian Labour in Politics* (1968), at p. 3ff. and the debate this essay has stimulated. See also G. Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (1965), and *Technology and Empire* (1969). For a legal perspective, see Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968),

18 *U.T.L.J.* 351; Macdonald, *supra*, note 25, at pp. 57–62. A parallel analysis in the regulatory field may be found in Doern, *supra*, note 42.

70. See T. Parsons, *Towards a General Theory of Action* (1953). A typical example of the inability of an American to understand these features of the Canadian political tradition is E. Friedenberg, *Deference to Authority* (1980).
71. This perspective is explored in L. Fuller, "Freedom — A Suggested Analysis" (1955), 68 *Harv. L. Rev.* 1305.
72. See Jackson, "Bankruptcy, Non Bankruptcy Entitlements, and the Creditors' Bargain" (1982), 91 *Yale L.J.* 857 for a thorough discussion of this difficulty in the context of secured financing. Jackson's analysis is easily applied to all facets of the common law. One might also note the following paradox. Market theorists argued in the 19th century for the standardization of weights and measures; today many advocates of deregulation protest the imposition of the metric system. Ounces, pounds, inches and miles, apparently are not regulation but structural preconditions; grams, kilograms, metres and kilometres, however, are regulation.
73. This is the position taken in R. Nozick, *Anarchy, State, and Utopia* (1974).
74. For an analysis of this dichotomy, see L. Fuller, "Two Principles of Human Association" in Winston, *supra*, note 49, at p. 67.
75. See Renner, *supra*, note 4.
76. This may be traced at least to Aquinas. See J. Shklar, *Legalism* (1964).
77. See Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979), 17 *O.H.L.J.* 1; Risk, *supra*, note 25; Baggaley, *supra*, note 3.
78. For the sake of brevity, alternative legal philosophies which have in the past been relatively influential in Canada, but are now in disrepute, will not be considered. I have discussed these in "Social and Economic Control Through Law" (1977), 25 *Chitty's L.J.* 7; "Curricular Development in the 1980's: A Perspective" (1982), 32 *J. Legal Educ.* 569; "Postscript and Prelude: The Jurisprudence of the Charter — Eight Theses" (1982), 4 *Supreme Court L. Rev.* 321.
79. On the implications of this point, see Gordon, "Historicism in Legal Scholarship" (1981), 90 *Yale L.J.* 1017.
80. For a critique, see L. Fuller, *Anatomy of the Law* (1968), at pp. 43–120.
81. See McRuer Report, *supra*, note 21, at pp. 17–21.
82. See J. Landis, *The Administrative Process* (1938), and K. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969).
83. See R. Macdonald, *The Proposed Section 96B: An Ill-conceived Reform Destined to Failure* (1985), 26 *Cahiers de Droit* 251. Of course, legislative recourse to privative clauses, subjective grants of power and unorthodox procedural mechanisms is intended to minimize this subsumption.
84. The case of Lon Fuller is exemplary. See Summers, "Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law" (1978), 92 *Harv.L. Rev.* 433.
85. There is a nice parallel between Dicey's view and Rawls' conception of rules of practice. See Rawls, "Two Concepts of Rules" (1955), 64 *Phil. Rev.* 3.
86. See Pound, "The Limits of Effective Legal Action" (1917), 3 *A.B.A.J.* 55; L. Fuller, "The Law's Precarious Hold on Life" (1969), 3 *Georgia L. Rev.* 530.
87. See W. Cook (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) (Selected essays by W. Hohfeld); and A. Kocourek, *Jural Relations* (2d ed.) (1928) for analyses of how this connexion is to be preserved.
88. See R. Unger, *Law in Modern Society* (1976). On the perfectability of society through legislative enactment, see J. Frank, *If Men Were Angels* (1942), and *Law and the Modern Mind* (1931). But compare Arnold, *The Symbols of Government* (1935).
89. An excellent collection of readings that explores this point is J. Smith and D. Weisstub (ed.), *The Western Idea of Law* (1983). See also Aubert, supra, note 65.
90. For attempts to resolve this problem, see C. Diver, "The Optimal Precision of Administrative Rules" (1983), 93 *Yale L.J.* 65; Jacoby, *supra*, note 31.

91. The consequences of this view are explored in Wexler, "Non-judicial Decision-making" (1975), 13 *O.H.L.J.* 839.
92. See, for example, L. Fuller, *The Morality of Law* (rev'd ed.) (1969), Chapter II; Hart, *supra*, note 44, Chapter VI; R. Posner, *Economic Analysis of Law* (2d ed.) (1977), at p. 419; G. Von Wright, *Norm and Action* (1963).
93. The next three paragraphs are an elaboration and modification of theses argued by Diver, *supra*, note 90.
94. For a perspective on how and why this occurs, see C. Stone, "Existential Humanism and the Law" in T. Greening (ed.), *Existential Humanistic Psychology* (1971), at p. 152ff.
95. See J.B. White, *When Words Lose Their Meaning* (1984), and Macdonald, "Canada's Bilingual Legal System" (1984) (to be published in 22 *O.H.L.J.*). For further critiques of discursivity and legalism, see Wexler, "Discretion: The Unacknowleged Side of Law" (1975), 25 *U.T.L.J.* 120; L. Fuller, "Positivism and Fidelity to Law — A Reply to Professor Hart" (1958), 71 *Harv. L. Rev.* 630. See also W. Bishin and C. Stone (ed.), *Law, Language and Ethics* (1972).
96. An extreme version of this thesis is argued in R. Carnap, "The Elimination of Metaphysics Through Logical Analysis of Language" in A. Ayer (ed.), *Logical Positivism* (1959).
97. See Ross, "TO-TO" (1957), 70 *Harv. L. Rev.* 812.
98. For a devastating critique of this view, see M. Foss, *The Idea of Perfection in the Western World* (1947).
99. For the counter position, see M. Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (1958).
100. See Steinberg, "The Eye Is a Part of the Mind" in S. Langer (ed.), *Reflexions on Art* (1961), at p. 244, for a view of art, physics, psychology, and so on, which shows how complex the relationship between theory and practice really is.
101. On this last point see Samek, "Untrenching Fundamental Rights" (1982), 27 *McGill L.J.* 755; and Macdonald, "Postscript and Prelude," *supra*, note 78.
102. From a speech given by the Ontario Ombudsman, Arthur Maloney, at the Faculty of Law, University of Windsor, on March 8, 1976.
103. In other words, at this point, delegations of authority to private citizens (even though examples of regulatory activity) will not be considered as governmental. But see *infra*, subsection "Regulation Reconsidered."
104. The political science literature suggests several explanations of how and why regulation has come to be viewed as a political commodity. See *supra*, notes 6, 9, 42, 61, 63, 64 and 68; see also M. Fiorina, *Congress: Keystone of the Washington Establishment* (1977), at pp. 44–45; M. Fiorina and R. Noll, "Voters, Legislators and Bureaucracy: Institutional Design in the Public Sector" (1976), 68 *Am. Econ. Rev.* 246; Weingast, Shepsle and Johnson, "The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics" (1981), 89 *J. Pol. Econ.*, 642.
105. For an account of these developments as elaborated in the next six paragraphs, see Macdonald, *supra*, note 25; Rowell-Sirois Report, *supra*, note 66.
106. See the reports cited, *supra*, at notes 20, 22, 23 and 24. See also the doctrinal sources cited, *supra*, at notes 2, 5, 6, 9, 10, 30 and 40. The extensive cross-referencing among the above sources suggests perhaps partisan advocacy rather than objective analysis. A like conclusion is drawn by Diver, *supra*, note 40.
107. See Arthurs, *supra*, note 7.
108. For a similar assessment of analogous processes in the United States, see Wilson, *supra*, note 6.
109. Once more, the U.S. example is instructive. See "Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking" (1981), 94 *Harv. Law Rev.* 1871 and footnotes therein.
110. See Landis, *supra*, note 82; H. Friendly, *The Federal Administrative Agencies* (1962). Of course, in Canada we never succumbed to the myth of objective, non-political

technical expertise quite as wholly as did the United States; cabinet directives and cabinet appeals are the most obvious unique features in our process. See H. Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Agencies in Canada" (1979), 17 *O.H.L.J. 46*.

111. For an anticipation of this phenomenon, see R. Noll, *Reforming Regulation: An Evalution of the Ash Council Proposals* (1971).
112. See Breyer, *supra*, note 9, Chapter 8.
113. The most extensive analysis of regulatory budget control may be found in Litan and Nordhaus, *supra*, note 10; but see Diver's critique, *supra*, note 40.
114. See *supra*, note 109.
115. See, especially, the report of the Commons Special Committee on Regulatory Reform, *supra*, note 23. For an American view, see Breyer, *supra*, note 9.
116. For suggestion and counterpoint, see C. Argyris (ed.), *Regulating Business: The Search for an Optimum* (1978); G. Stigler, "The Theory of Economic Regulation" (1971), 2 *Bell J. Econ.* 3. A recent example can be seen in the reinstatement of the census. Without readily accessible demographic data paid for by all citizens, individual businesses would be required to purchase private opinion poll surveys, the cost of which by definition could then be passed on only to their clients.
117. See Willis, *supra*, note 69, and Arthurs, "Protection Against Judicial Review" (1983), 43 *R. du B.* 277 for the contrary position. A particularly forceful presentation of the pro position may be found in Grey, "The Ideology of Administrative Law" (1983), 13 *Man. L.J.* 35.
118. The influences of judicial atavisms are explored in Willis, "Foreign Borrowings" (1970) 20 *U.T.L.J.* 274 and Macdonald, *supra*, note 33.
119. See Macdonald, "Jurisdiction, Fault and Illegality: An Unholy Trinity" (1985) 16 *R.G.D.* 69 for an elaboration of this last point.
120. See Macdonald, *supra*, note 50, for an account of this rationality.
121. See Posner, *supra*, note 92, at pp. 399–418.
122. This recognition is the justification for Calabresi's call for a reinvigorated common law: see G. Calabresi, *A Common Law for the Age of the Statutes* (1982). See also Goldberg, "Institutional Change and the Quasi-Invisible Hand" (1974), 17 *J.L. & Econ.* 461.
123. Its origins may be traced at least as far as Aristotle. See E. Barker (ed.), *The Politics of Aristotle* (1962).
124. See S. Milsom, *Historical Foundations of the Common Law* (2d ed.) (1981), at pp. 1–96.
125. The thesis is persuasively argued by Renner, *supra*, note 4, and Gordon, *supra*, note 79. See also A. Watson, *Society and Legal Change* (1977).
126. In this section I acknowledge a profound intellectual debt to the late Lon L. Fuller. See, notably, his essays cited, *supra*, notes 49, 53, 71, 74, 80, 86, 92 and 95. Several other theorists have argued like positions.
127. See L. Fuller, "Two Principles of Human Association" in Winston, *supra*, note 49.
128. See "Rethinking Regulation," *supra*, note 109.
129. This summary is drawn from K. Winston, "Introduction" in Winston, *supra*, note 49.
130. See Macdonald, *supra*, note 50, pp. 28–33.
131. See Diver, *supra*, note 40.
132. But see Dobra, "Property Rights in Bureaucracies and Bureaucratic Efficiency" (1983), 40 *Pub. Choice* 95.
133. See, for example, Litan and Nordhaus, *supra*, note 10.
134. See M. Polanyi, *The Logic of Liberty* (1951), and M. Olson, *The Logic of Collective Action* (1965), for theoretical explanations of how markets are regulatory structures. See also G. Peller, "The Politics of Reconstruction" (1985), 98 *Harv. L. Rev.* 863, especially at 869–76.
135. See White and Wittman, "A Comparison of Taxes, Regulation and Liability Rules Under Imperfect Information" (1983), 12 *J. Legal Stud.* 413.

136. For an exception, see Lindblom, *supra*, note 46.

137. See Breyer, *supra*, note 9, Chapter 10.

138. This point is nicely made in Chapman and Guinn, "Efficiency, Liberty and Equality: Three Ethical Justifications for Regulatory Reform" (1982), 20 *O.H.L.J.* 512.

139. This point may be derived from M. Horwitz, "Law and Economics: Science or Politics?" (1980), 8 *Hofstra Law Review* 905.

140. See J. Vining, *Legal Identity* (1978).

141. See, for a general investigation of this point, R. Samek, *The Meta Phenomenon* (1981).

3

Administrative Tribunals: *Their Evolution in Canada from 1945 to 1984*

DAVID J. MULLAN

Introduction

To write a paper on administrative tribunals in large measure is to write a paper about government. This is so because many of the bodies that Canadians think of as administrative tribunals actually perform all the major governmental functions: they legislate by developing rules and policies to be followed in their day-to-day work; they exercise discretion within the mandate laid down in either their empowering legislation or their own rules and policies; and they perform the judicial role of adjudicating on individual matters that come before them.

A full study of Canadian administrative tribunals would, therefore, involve a consideration of the extent to which this fourth branch of government exists in our country today, and also an analysis of the reasons for its creation and growth. At some point there would also have to be a measurement of the appropriateness and effectiveness of the present system of administrative tribunals. Have they fulfilled the objectives of the legislatures establishing them and perhaps also of those private interests who pressured for their creation? Would the various interests in the country have been better served by the assignment of these tasks to the accepted constitutional arms of government — the legislature, the executive and the judiciary? Such questions are, of course, not simply a matter of whether the objectives of the creators would have been more fully achieved by other means; they also raise issues about the value of the objectives themselves and the political, constitutional and economic foundations of our governmental system. Indeed, such questions reach back to the initial government decision to regulate and, once such a decision was taken, the choice of the particular form of regulation.

To take a concrete example, should governments regulate the commercial airline industry at all, or should it be left to operate entirely as a private sector activity? If government is to regulate, what areas of the activity should be regulated: safety, personnel, airports, routes, timetables, fares? What modes of regulation or control should be adopted? Complete government ownership of the entire enterprise? Licensing, policing, taxing, incentive creating, contracts, or education and non-enforcible suasion? Who should do the regulating? The legislature, the executive, government departments, administrative tribunals or perhaps even other contract-for-service private bodies? Moreover, it may be that the most appropriate configurations from any perspective (political, constitutional or economic) can only be determined on an individual basis — that generalizations are difficult and uniqueness is the common denominator.

A full study of administrative tribunals thus would be a massive, important and controversial undertaking. It should be noted that there are extensive studies of the administrative process which have taken place in Canada during the past few years, and a significant body of private scholarship on the subject now exists. In the late 1960s there was the Ontario Government's *Royal Commission, Inquiry Into Civil Rights* (McRuer Commission),[1] with its meticulous examination of the legal forms of the province's administrative process. At the federal level, the Law Reform Commission of Canada has issued many study papers on individual administrative tribunals or agencies,[2] and also has tackled in its study and working papers many topics relating to administrative tribunals in general such as parliamentary,[3] executive[4] and judicial controls[5] on the administrative process. It is now in the course of preparing an important report to Parliament, based on its earlier working paper[6] on the general topic of independent administrative agencies. This new report will concentrate on the structure and procedures of such agencies and their relationship with the rest of government. Administrative tribunals have also loomed large in the Economic Council of Canada's Regulation Reference,[7] the *Report of the Royal Commission on Financial Management and Accountability* (Lambert Commission),[8] and the 1980 Report of the House of Commons Special Committee on Regulatory Reform (Peterson committee).[9]

None of these studies comes close to providing a full account of the multitude of forces at work in our present system of administrative tribunals, and none of them develops full and coherent political, constitutional and economic models within which the various choices — exemplified by the airline regulation example — could be evaluated and decided upon.

These deficiencies will not be rectified in the present study, because time and resources are not available. Indeed, without the gathering of considerable amounts of empirical data and the application of economic analysis far beyond my present capacities, it is open to question whether or not the limited areas that I have chosen to emphasize can be regarded as satisfactorily studied and analyzed. Moreover, even within these limits,

a further danger emerges. For all their incompleteness, the studies already alluded to contain a great deal of accumulated wisdom and ideas for reform of the administrative process. The task of the author of a relatively short paper such as this, therefore, becomes to describe and to analyze aspects of a complex topic without being simply derivative of a substantial body of work that has already gone before.

Conscious of these dilemmas, I made two choices, one substantive and one stylistic. In terms of content, I will focus on the operational aspects of administrative tribunals and on the relationship that exists between administrative tribunals and the conventional or traditional branches of government. In this context, I will ask questions about the appropriateness of existing control mechanisms and the processes and reality of accountability. My time frame will be mainly the era from 1945 to the present, and my data base will be the tribunals of Ontario, Saskatchewan and the federal jurisdiction. As for style, I have chosen to be discursive after the manner of an essay rather than attempting a comprehensive survey and analysis of the data, literature and myriad issues.

In my view, such writing can never be value free. It therefore is incumbent on me to reveal my value preferences insofar as they might affect the content of this paper and insofar as I am able to articulate them. I favour neither a completely free market economy nor complete state ownership or direct intervention in all areas of human activity. Of course, few people can be characterized as fitting within either of these camps or philosophies, and in between there is a vast range of possibilities.

Within this wide range, I see a place in many situations for the typical administrative tribunal. It is a body which usually has an adjudicative-type role and which almost always is involved also in standard setting and policy making, either explicitly or implicitly. Such a structure for decision making is desirable because of a variety of factors. The most notable of these are well known: inadequate adjudicative performance by the courts, in terms of substantive, procedural or remedial considerations; a specialized area where expertise is important; a situation where the removal of party political considerations may be appropriate; the desirability of combining legislative, executive and adjudicative functions in one body. To these, I would add a somewhat more problematic and controversial consideration. At least in certain circumstances, the diffusion of government power through the use of administrative tribunals may enhance democratic or participatory values in our society in a way that has ceased to be possible or feasible within the framework of our traditional representative institutions, the legislature and the executive.

Tribunals: A Working Definition

The difficulty of formulating a satisfactory definition of the term "administrative tribunal" is but one of the indicators of the complexity

of the topic. There is a reasonably well-accepted concept of what the typical administrative tribunal looks like. It is a multimember, permanent body consisting of members external to the regular government and judicial structures. It decides upon matters of individual and group rights and entitlements, usually after an adjudicative-type hearing.

The real problem in definition is to decide what deviations from the typical are acceptable without the body being converted into something other than an administrative tribunal. I would not, for example, want to exclude from my definition those tribunals which consist of single decision makers, or decision makers who operate under the aegis of a government department and who are themselves civil servants. Nor would I want to exclude all ad hoc bodies such as commissions of inquiry. Many bodies generally accepted as being administrative tribunals do not decide questions definitively but merely advise or recommend. Neither should the notion of an adjudicative hearing preclude the use of the term tribunal where other decisional techniques such as mediation, conciliation and negotiation are used.

In addition, the activities of many of Canada's administrative tribunals (or agencies, as they are often called) involve tasks other than determining matters of individual or group rights and entitlements. Thus, bodies such as the Ontario Securities Commission (OSC), the National Energy Board (NEB), the Canadian Radio-television and Telecommunications Commission (CRTC) and the Canadian Transport Commission (CTC) not only adjudicate on issues involving rights and entitlements, but also establish (either alone or in collaboration with the executive) general standards to be followed and applied in the various fields that they regulate.

Nor would I want to put beyond the definition of administrative tribunal a body which is simply a standard setter without associated adjudicative functions, though I would expect such a body to possess some of the other attributes of the typical model. Without such a qualification, the term administrative tribunal would include government departments and ministers of the Crown.

For the purposes of this study, I therefore regard none of the features of the typical model as being essential, but require a combination of at least some of them for a body to come within the ambit of the term "administrative tribunal." All of this perhaps can be given clearer focus if I describe why I would not view the Royal Commission for which this paper is being written as an administrative tribunal. It is a multimember body external to government and it has engaged in hearings across the country, but it does not adjudicate nor is its task to set standards; its role is a purely advisory one. Moreover, its mandate is not restricted to a specific area of operation or concern but involves the economic aspects of all fields of government. It is also ad hoc in the sense of being set up as a one-time exercise. Its deviations from the norm are therefore substan-

tial and it comes outside of my understanding of what constitutes an administrative tribunal.

Before leaving the question of definition, there is another categorization exercise that is important. A significant difference exists between administrative tribunals that operate as dispute-resolving (in the manner of the civil jurisdiction of the regular courts) or enforcement bodies (in the manner of the criminal jurisdiction of the regular courts) on the one hand, and tribunals such as the CRTC and the CTC on the other. They too perform such functions, but they also set standards, develop policies and, in their adjudicative roles, decide questions of individual entitlement against broad public interest standards.

This is not meant to suggest that there are two clear-cut types of administrative tribunal. It becomes evident that such a division does not exist when one considers the variations among tribunals that decide upon issues of individual or group entitlement to licences and benefits. At one extreme are bodies that decide such questions by reference to relatively precise legal or factual standards; at the other extreme are the open-ended, discretionary standards exemplified by the NEB's "certificates of public convenience and necessity."[10] Nevertheless, where a tribunal fits in this spectrum of decision-making processes will be relevant to determining many of the considerations vital to any inquiry into administrative tribunals. These considerations include the degree of independence from government control or interference, the qualifications and tenure of members, the nature of the proceedings from which conclusions emerge, and the relationship between the body in question and the courts.

In fact, to foreshadow a point developed more explicitly later in the paper, it may be that some of the difficulties we have with major regulatory tribunals stem from the fact that most of them perform functions all along this spectrum. What may be suitable structures and arrangements for certain aspects of the agency's mandate may not be suitable when it comes to some of the other functions it performs. In fact, this is particularly pertinent to the problems of the Cabinet as an administrative tribunal.

Development of Administrative Tribunals

The time frame for this study of Canada's administrative tribunals is the period between 1945 and the present and its focus will be tribunals of three jurisdictions: Ontario, Saskatchewan and federal.

On the provincial front, the general pattern of tribunal functions had been well established by 1945. There were surprisingly few differences between the two provinces in the areas of activity regulated or controlled by tribunals in 1945. Thus, a survey of the provincial statutes of Ontario and Saskatchewan in force in 1945 reveals that a considerable proportion (half in Saskatchewan and slightly less in Ontario) of the tribunals were

involved in occupational licensing. In each jurisdiction, tribunals also at that time dealt with matters arising from the expropriation of land, municipal planning, workers' compensation, and highway regulation (including the licensing of trucking operations). Also, in each province, collective bargaining and its associated Labour Relations Board had been established shortly before the end of World War II. The only significant differences between the two jurisdictions were the existence in Ontario of a securities commission and natural gas regulation as well as tribunals associated with farm products marketing. These tribunals did not exist then in Saskatchewan.

Between 1945 and 1984, the number of tribunals in each of the two jurisdictions increased dramatically, more than doubling[11] in the case of Saskatchewan and slightly less than doubling in the case of Ontario. This has left the two provinces roughly equal in terms of numbers of tribunals,with Saskatchewan slightly ahead. In part, the greater growth in Saskatchewan can be attributed to catching up, but there was also the creation of a number of tribunals as part of the Saskatchewan government's moves to protect the province's natural resources.[12]

These differences aside, what is common to the development of administrative tribunals in both provinces during the past 30 years is the assertion of regulatory control over an increased number of occupations,[13] plus the inauguration of the regulation of a number of new areas of social concern such as criminal injuries compensation, human rights protection, environmental protection, rent regulation, and consumer protection generally.

In many instances, the creation of regulatory regimes in these areas was the result, at least in part, of a perception that the regular courts were not able to perform the task of fashioning adequate substantive and remedial regimes in the public interest. As was the case earlier with labour relations, these considerations almost certainly played a role in the enactment of human rights, consumer protection and environmental protection legislation. It is also probably true to say that certain provinces wanted to remove authority over some areas from federally appointed judges to tribunals staffed by their own appointees.

At the federal level, the picture is somewhat different. Most of the tribunals were established after 1945. In its Working Paper No. 25, *Independent Administrative Agencies*, the Law Reform Commission of Canada reports that "all the agencies forming the subject of specific studies by the [Law Reform] Commission . . . were either created or reconstituted in the post-war years."[14] That list was as follows:

- Anti-Dumping Tribunal
- Atomic Energy Control Board
- Canada Labour Relations Board
- Canadian Radio-television and Telecomunications Commission
- Immigration Appeal Board
- National Energy Board
- National Parole Board
- Pensions Appeal board
- Tariff Board

- Canadian Transport Commission
- Unemployment Insurance Commission

and to it others can be added such as the Public Service Staff Relations Board.

Tribunals did operate in some of these areas prior to 1945. Indeed, the Board of Railway (and then Transport) Commissioners had been an independent regulatory agency since 1903.[15] It was subject then (as its successor, the Canadian Transport Commission, is now) to appeals on law and jurisdiction to a court and to a review power exercised by Cabinet. Nevertheless, in those other areas where tribunals existed in 1945, they did not resemble the independent regulatory agencies that characterize much of federal regulatory activity today. Thus, in the area of broadcasting there were licensing functions but they were exercised by the Canadian Broadcasting Corporation and the federal minister responsible.[16] The Air Transport Board issued airline licences subject to ministerial approval, a fetter that also governed the cancellation and suspension of licences.[17] These aside, atomic energy, oil and gas, anti-dumping and foreign investment, to mention but a few, remained concerns for the future. Outside these broad regulatory areas, in matters involving individual rights, there were decisions being made about prisoners and aliens but in nothing like the same format as provided for in parole and immigration legislation today. However, the unemployment insurance scheme, as we know it today, was pretty much in place by 1945.[18]

It is also true, particularly in the federal arena but also of provincial tribunals, that a simple rough counting and description of the areas dealt with by administrative tribunals does less than justice to the evolution of regulatory and tribunal activity from 1945 to the present day. What would immediately strike an observer comparing the 1945 regulatory scene with that of today would be the political importance assumed by regulatory agencies in many of the vital areas of the country's economic activity. At the federal level, not only has the scope of regulatory activity broadened considerably but those areas such as broadcasting, telephones and transportation already federally regulated in 1945 have grown tremendously in significance in the fabric of the country as a whole. Basically, the major regulatory agencies are now a political force in the affairs of the country to an extent that would have been difficult to imagine in 1945, though there were undoubtedly already clear indicators of the potential for such a movement in the growth of the United States regulatory agencies.

What would also strike the observer of 1945 would be the growth of proceduralism or participatory opportunities as an adjunct to tribunal decision making. At the level of tribunals deciding upon matters of individual rights and entitlements, be they federal or provincial, participation by those directly affected has become much more accepted than it was in 1945. In a sense, this is reflected most dramatically by the enactment

of a Statutory Powers Procedure Act in the province of Ontario in 1971.[19] However, it also manifests itself in the now almost universal right to a hearing on the issue of expropriation of land,[20] as opposed to a hearing simply on the question of compensation. During this period, procedural rights also have been attained by prisoners, parolees and aliens and attached to the dispensing and withdrawing of welfare benefits of various kinds.

Perhaps even more startling to the observer of 1945 would be the opportunities now provided for public participation in broader regulatory decision making. At the provincial level are the participatory rights afforded to the public in matters of town and local planning and in such governmental decision making as the siting of landfill dumps and transmission lines. Federally, public participation is the norm in virtually all the principal regulatory agencies. Moreover, segments of the public have been quick to take up this opportunity, as public interest groups have proliferated and more and more lawyers devote themselves to the practice of public interest law. Certainly, public interest groups existed and played a role in the regulatory process before 1945,[21] but their members and participatory rights have burgeoned. Their accepted role in the regulatory process is apparent in the extent to which they are funded by governments and increasingly being awarded costs by tribunals across the country.

In sum, the regulatory or tribunal process of 1984 is quite different from that which existed in 1945. In Ontario and Saskatchewan, the basic framework of tribunals has not varied dramatically from that which was in place in 1945; the same is not true of the federal regulatory regime. More important, regulatory agency activity has become a far more significant component of the government of the country than it was in 1945 and, as a result, the age of participation or proceduralism has clearly come to Canada's tribunals.

Procedures

The focus of much of the discussion about Canada's administrative tribunals has been the issue of the procedures which they employ in reaching decisions. The reasons for this focus are not difficult to identify. Those disappointed at the outcome of administrative processes are quick to raise concerns about the extent to which their side of the story has been heard, and the courts increasingly have been willing to look favourably on procedural unfairness as a ground for judicial review.[22] Legislators have also been attracted to the proposition that fairness and informed decision making depend upon statutory authorities listening to all sides (e.g., the Ontario Statutory Powers Procedure Act), and administrative tribunals such as the CRTC and CTC have themselves been concerned with devising carefully crafted and appropriate procedures.[23]

Initially (and this remains true of involvement of the courts with the issue of procedures), most of the attention was directed toward the indi-

vidualized decision making of the administrative tribunals, exemplified by the resolution of one-on-one disputes and the revocation and suspension of licences. If rights or important interests were affected, then demands were made for adherence by the statutory authority to an almost court-like model of procedure. Of course, the deployment of a full judicial model for the resolution of one-on-one disputes is not necessarily the most appropriate or cost-effective way of operating a decision-making regime. Concentrating on issues such as the availability of legal counsel and cross-examination not only assumes the validity of the full judicial model but may at the same time prevent desirable adjudicative flexibility. It may also preclude the use of other types of decisional techniques such as negotiation, mediation and conciliation.

Nevertheless, there are elements of procedural fairness that transcend the adjudicative model and are appropriate standards to be applied whether the dispute resolution or decision-making method used is adjudication, mediation, conciliation or negotiation. These procedural elements are the true essence of natural justice or procedural fairness: the rights of individuals affected by decisions to (a) notice of those proceedings and what is at issue, and (b) an opportunity to put their case in the light of all the information relevant to the decisional process being utilized.

In fact, this so-called essence of procedural fairness has attractions for decision making other than simple dispute resolution. The range of tasks undertaken by Canada's tribunals extends from conventional adjudicative functions to policy formulation that depends upon a mass of considerations and may affect the whole of Canada's population (e.g., a CRTC Canadian content rule, or a decision in a Bell Canada rate application; an NEB certificate of convenience and necessity for the construction of a gas pipeline).

Because some of these broad policy formulation tasks are initiated by an application to a regulatory agency by a specific individual or group in society, it is perhaps natural that there should be a hearing at which that individual or group can present arguments for the course of action proposed. This right is embodied in most regulatory legislation, along with a right or discretion on the part of the regulatory agency to hold a public hearing on the application in which others can participate.[24]

What can be seen here is an extension of the judicial or hearing model to broader decision-making tasks because some of the reasons for that model are applicable. When an adjudicative tribunal is concerned with ascertaining facts, it is as well to allow those who may be in possession of relevant facts to participate. Similarly, policy-making tribunals almost invariably operate from a factual basis in order to illuminate the policy choices they are charged with making. Given this necessity, the opening up of the process to the public at large might be seen as simply a way of ascertaining the facts relevant to the policy inquiry.

However, the according of participatory rights to the public in such situations has far more to it than the objective of providing a forum for

the gathering of evidence and the resolution of factual conflicts. Rather, the objective is to allow those who so desire to make comments on and identify their preferences with respect to the policy issues involved. To the extent that the major regulatory tribunals are created to perform tasks that have been moved (in whole or in part) out of the traditional parliamentary and Cabinet processes, it is not surprising that the creating legislature or the agency itself should opt for public involvement in the decisional process.

On matters of policy or political choice, the public hearing represents a surrogate for the perhaps fictional cut-and-thrust of legislative debate and the far more real process of lobbying that engages the attention of any government involved in policy formulation. Thus, insofar as regulatory agencies are flawed as representative bodies and are prevented from overt participation in a lobbying process by their legislative designation as court-like agencies, the public hearing becomes one of the devices by which they can become attuned to policy alternatives and preferences and, perhaps more importantly, to political pressures. (Among the other devices are Cabinet directives and appeals, and agency observation of media reaction to their activities.)

While all of this might seem trite, it may nevertheless not be sufficiently articulated or appreciated in the operation of Canadian regulatory agencies. At the very least, it produces dilemmas for legislators, regulatory agencies and the courts.

In those situations where public hearings are held, there may be questions as to who may participate in the hearing process. This issue tends to arise in the context of hearings which are not designated as public but which have a policy or public dimension, and therefore demands for participatory rights are made. There is also the question of whether public interest groups should be entitled to financial assistance or "costs" toward the expense of their appearance before the regulatory agency. Finally, there is the major problem of the amount of information to which the public participants are entitled. While there has been considerable movement in the area of access to the information generated by the initiator of the application and other public participants in the hearing,[25] there remains considerable reticence with respect to the factual data generated within the regulatory agency itself and even more reticence regarding the comments and debate on the policy issues by agency staff.[26]

Even more important, however, is the extent to which there should be public hearings where the triggering mechanism for regulatory agency activity is not a specific application but an agency decision to engage in general rule or policy making divorced from the context of an individual application (e.g., a new CRTC "Canadian content" rule). Given that the nature or scope of the issues involved will often not vary from the process started by individual application or agency initiative, little would seem to turn on this point as far as public involvement is concerned. In fact, until

recently, Canadian legislatures have seldom imposed rule- or policy-making hearing obligations on major regulatory agencies,[27] and the agencies themselves have been only somewhat more forthcoming in this respect.

Now, at least at the federal level, legislative mandating of rule-making hearings is more frequent and agencies are far more willing to impose such an obligation on themselves. As well, the process of publishing regular regulatory agenda and the arrival of access to information legislation both indicate an increased federal commitment to public entitlement to participate in the regulatory process.[28]

It is interesting to contrast these developments with the continuing philosophy of the Canadian courts with respect to such matters. Coming from the tradition that sees fair procedures being imposed where the issues involved are those of a type resolved generally by courts, the judges have been extremely reticent in this whole area. Thus, public hearings do not entitle participants to access to staff studies.[29] If a "public hearing" is not called for, participatory rights are rationed out grudgingly to public interest groups.[30] Appeals to Cabinet from the decisions of regulatory agencies are only occasionally seen as calling for any procedural protections at all.[31] Moreover, as far as rule-making hearings are concerned, there has been absolutely no disposition on the part of the courts to impose such an obligation on a regulatory agency where that is not provided for by statute.[32]

Of course, it may be that courts are not competent to make the appropriate judgments as to whether such procedures are necessary and that those decisions are best left to the legislature and the agencies themselves.[33] Nevertheless, whether this is the reason or whether it stems from a judgment on the part of the courts that such procedures are not appropriate, it is clear that the recent liberalization by the courts of the rules with respect to procedural fairness has not been nearly as radical as might have been supposed. Certainly it is now easier to convince a court to impose procedural obligations on certain decision makers, but that development has been confined largely to statutory contexts involving one-on-one disputes or individualized decision making with a heavy factual emphasis. Moreover, whatever the attitude of the courts to issues of procedure, the serious question still remains as to whether the polity is well served by a process in which such policy-making procedures are opened up to this kind of public participation.

Let me draw together what I perceive to be the major issues involved in the current debate about proceduralism. Most of these issues have already been mentioned or at least foreshadowed, but some are more specific extrapolations from the earlier material:

1. To what extent has tribunal resolution of one-on-one disputes, or individualized matters, been over-judicialized and less open to the possibility of alternative dispute resolution mechanisms?

2. At what stage should demands for procedural fairness in one-on-one disputes give way to considerations of expense and the diversion of resources away from the substantive objectives of legislative programs?
3. What is the potential of the Canadian Charter of Rights and Freedoms[34] and, at the federal level, the Canadian Bill of Rights[35] for imposing further and different procedural obligations on tribunals and to what extent is this desirable?
4. Is there a case to be made for procedural codes applicable to at least conventional adjudication, such as adopted by Ontario in its Statutory Powers Procedure Act and to a lesser extent by Alberta in its Administrative Procedures Act?[36]
5. To what extent does effective participation in a decision-making process depend upon access to the material, be it factual or opinion, that is fed to a decision maker by its staff and other sources?
6. Are further movements in the direction of rule or policy hearings desirable, or have legislatures and administrative agencies gone too far in this direction already? Do policy formulation questions or political questions lend themselves to participatory rights of the type associated with typical adjudicative hearings?
7. Once the issue moves beyond the tribunal itself to an overriding political agency such as a minister or the Cabinet, should procedural claims end?

In this paper it is not possible to provide definitive answers to all these questions. In fact, most are the stuff of which continuing controversy is made, while some raise deep questions about the nature of our political system and what type of society we want. This paper will, however, attempt to identify some of the considerations that bear upon the explicit or implicit choices contained in each of the questions.

Over-Judicialization

There exists considerable pressure within our system of administrative tribunals for the judicialization of the processes of those tribunals. Legal training almost inevitably indoctrinates lawyers with the values of the trial system as a method of resolving disputes, and lawyers appearing before administrative tribunals and their clients, imbued with the popular sense of the criminal trial, naturally attempt to lead tribunals farther and farther along the path to trial-type procedures with little or no recognition of the distinctive roles played by many administrative tribunals.

Lawyers also draft statutes and sit on and work for commissions such as the McRuer Commission in Ontario. The temptation once again is to surround the decision-making functions of the tribunal with judicial-type procedures or, as in Ontario, to draft a general procedural statute heavily laden with court-like procedures. Indeed, the force of these tendencies is illustrated dramatically in a recent complaint by Martin Teplitsky, one

of Ontario's most prominent lawyer/labour arbitrators, about the continuing drift of the labour arbitration process toward judicialization, with the resultant narrowing of the gap between arbitration and regular court proceedings as a method of settling labour disputes.[37]

On the other hand, the perniciousness of this influence should not be over emphasized. At a very basic level, legal education in this country is emphasizing more and more the value of methods other than traditional court-like procedures for the resolution of problems. Moreover, the techniques of conciliation, mediation and negotiation are well ingrained in the labour and human rights processes of the country despite the perpetuation of the idea that true adjudication ("everyone deserves a day in court") is a civil right of anyone involved in potential liabilities.[38]

As well, administrative agencies have been firm in their resistance to the encroachment of certain judicial-type processes. A notable example is the CRTC's continuing refusal to allow direct cross-examination of witnesses in the exercise of its telecommunications jurisdiction. Indeed, in this particular instance, that resistance has been sustained by the courts.[39] Moreover, while it is true that the courts, since the *Nicholson* decision in 1978,[40] have expanded the situations in which they are prepared to impose *some* procedural standards on administrative tribunals, they also have indicated a greater receptivity to the appropriateness of such non-judicial procedures as paper hearings,[41] limited entitlement to representation by counsel[42] and delegation of evidence collection and shifting tasks.[43]

It should be emphasized that there are many administrative tribunal functions to which court-like processes are appropriate. These would include, for example, professional disciplinary hearings involving potential removal of the licence to practise a profession. What remain problematic are the potential effects of the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights and the persistence of arguments for a federal administrative procedure act. To what extent will these perpetuate and perhaps heighten claims for judicial-type processes for tribunals? To these questions, I will return under later headings in this part.

Cost-Efficiency Arguments

In the previous section, I assumed that court-like procedures were not always the most appropriate for administrative tribunals. Why not? Obviously, sometimes they can become devices for the delay and frustration of the administrative process by those resisting its objectives. Even without this aspect, the more formal and court-like the procedures, the greater the time and cost involved and the greater are the barriers to participation. However, assuming the best of motives on the part of the parties involved and ample means for all affected to participate, proceduralism may have

considerable costs for the legislative programs of which administrative tribunals form part. In short, it may at times become necessary to ask the nasty question, Procedural rights: at what cost?

Three quite diverse non-Canadian examples help to illustrate the problems.

(a) Following the holding by the United States Supreme Court in *Goss v. Lopez* [44] that high school students were entitled to a hearing with respect to disciplinary suspension, considerable concern was expressed about the effect that this would have on the administration of high school discipline.[45] Would the school system break down completely? Would disciplinary measures become almost impossible because of the procedural straitjacket in which the system had been placed?

(b) In the past few years, the Commonwealth of Australia has imposed on its federal administrative system: a generalist administrative appeals tribunal; a federal court with enhanced judicial review authority; an ombudsman; and a human rights commission. In an era of restraint on government spending, government departments were forced to create new sections to respond to the demands placed on them by the new administrative law. This raised serious questions about the diversion of funds from departmental programs to the cause of rectifying individual injustices.[46]

(c) In the broader regulatory context, some agencies at the federal level in the United States moved to trial-type procedures for the development of new rules and policies. In its most extreme form, this produced the peanut butter fiasco in which the Food and Drug Administration spent 12 years and generated 77,736 pages of transcript as well as extensive litigation and informal discussions in determining what percentage of peanuts must be contained in peanut butter before it could bear that name.[47]

Canadian equivalents may perhaps be found in the concern of prison and parole authorities over the effect on the system of over-judicialization of prison discipline and parole violation issues. Excessive proceduralism may also be put forward as an explanation for the incredible difficulties involved in establishing locations for needed landfill sites or various types of transmission line.[48]

What these examples are meant to suggest is that excessive procedures may result in regulatory paralysis, and also may lead to an inappropriate diversion of funds from the many for the sake of rectifying the grievances of a few. Where the balance is to be struck is not a question that lends itself to easy answers.

What may assist in establishing a balance is the careful crafting of procedural rules by administrative tribunals so that they are not forced into ad hoc decisions on demands for procedural rights. Provided that crafting takes into account the special circumstances of the particular decision-making processes and acknowledges the existence of a certain critical

minimum of fair procedures, it may be possible to develop a relatively efficient system, and also one where the frustrations of judicial review applications or appeals on procedural grounds rarely occur. There is some support for this as a method of approach in the rule-making exercises in which the CTC and the CRTC have engaged recently. These exercises also have emphasized the usefulness and importance of involving regulated and affected constituencies in the procedure formulation process.

Impact of the Charter and the Bill of Rights

Both the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms represent a constitutional commitment to the value of procedural norms[49] even though, in each case, the opportunity exists for legislative override of the procedural protections they contain.[50]

There is evidence, however, that the impact of proceduralism was a matter of some concern to the drafters of the Charter. Both the debates and the omission of property rights from the "fundamental justice" protections of section 7 indicate a concern that the coverage of procedural protection could overreach and affect the substantive impact of government programs.[51] It is also apparent that, since the coming into force of the Charter, many lawyers have been anxious to seek a broad interpretation of section 7 such that it would reach, through "security of the person," a wide range of tribunal activities including those which affect property interests.[52] In addition, debate continues in the courts as to the ambit of section 11 and its criminal trial-like protections for those charged with an offence.

My belief, however, is that even if the courts give an expansive reading to section 11, the deleterious effects will be minimal, if any. The battleground of section 11 has been well identified, and it involves for the most part professional disciplinary matters[53] and such questions as the liability of individuals for discriminatory practices under the various human rights codes.[54] In such contexts, the claims for procedural rights of a court variety have their strongest appeal. Serious issues are involved. Liability is potentially significant. Factual questions are important. The legal issues are focussed. Discretion is at a minimum.

Most problematic may be section 11(d) and its call for an "independent and impartial tribunal." Questions already have been raised in the courts about the manner in which Canadian human rights tribunals[55] and prison disciplinary tribunals[56] are established and, in particular, the appointment of such adjudicators by those responsible for the administration of the relevant legislation. It remains to be seen how far the courts will interpret the Charter as a brake upon various methods of establishing adjudicative tribunals.

The potential reach of section 7 may be more hazardous. If property rights come to be read into the section, or there is a constitutional amend-

ment explicitly to include them,[57] then it may lead to further paralysis of necessary functions such as the selection of landfill sites or the location of transmission lines for oil, gas and electricity. As well, "security of the person," even without a landed property rights interpretation, contains the potential to generate procedural claims in the determination of entitlements to participation in various forms of welfare or social benefits.[58] This would be a recognition of the arguments put forth in Charles Reich's seminal article, "The New Property."[59]

Recognition of such a security or property interest in welfare participation is one thing. The judicial creation of elaborate, court-like procedures as the product of that recognition is another, given the financial ramifications of such hearings. On the other hand, section 7 with its call for adherence to the "principles of fundamental justice" is not nearly so precise in its prescription of procedural standards as section 11, and leaves considerable room for both tribunal and judicial autonomy in the crafting of procedural regimes.

An Administrative Procedure Act

In its Working Paper No. 25, *Independent Administrative Agencies*,[60] the Law Reform Commission of Canada advocates the enactment of a federal administrative procedure act, and this also appears to have been in the forefront of discussions by the same commission during the drafting of its report to Parliament on the same subject. In Working Paper No. 25, the justifications for the act are the procedural "inadequacies and anomalies"[61] revealed by that commission's study of various federal administrative tribunals.

Procedural deficiencies or not, there are serious difficulties with the drafting of administrative procedure legislation. There is the initial problem of deciding which tribunals shall be subject to the act. In Alberta, the application of the act depends on specific designation by the Lieutenant Governor in Council,[62] while Ontario relies upon a combination of statutory designation and judicial decision making within very general confines.[63] Suffice it to say that attempts to define what constitutes an "administrative tribunal" for the purpose of such legislation poses an intransigent problem. It is also clear that decisions as to inclusion or exclusion must depend at least in part on the procedural provisions of the legislation: the more court-like the procedures, the narrower the cast of the act should be and vice versa. At least, that constitutes conventional wisdom.

Thus, the Ontario legislation, with its very court-like minimum procedures, is explicitly excluded or modified for many decision makers and, even then, may be too rigid for some tribunals to which it does apply. For instance, it has no provision for delegation of powers, hearing or decisional, and this causes major problems for statutory authorities with

numerous members, such as university senates and the convocation of the Law Society of Upper Canada. It is also questionable whether it is worthwhile having such a statute when the exercise necessarily involves tribunal-by-tribunal consideration of the statute's reach to see whether adaptation is necessary. To be sure, that focusses attention on the issue of procedures and has a possible educational value for those engaged in the exercise, but there are other ways of accomplishing these objectives. Such an act also leaves open the issue of procedures for those tribunals not covered.

On the other hand, an act of broad or general application may be of even less utility in that its provisions are so uncontroversial or stated at such a level of generality as to leave open most of the difficult issues of procedure for tribunal and, perhaps ultimately, judicial resolution. This is evident in the tentative list advanced by the Law Reform Commission:

> . . . reasonable notice of a hearing to parties to any proceedings; public notice with opportunity to comment on the content of rule-making; provision for a hearing with the full panoply of traditional procedural safeguards in proceedings where the imposition of significant sanctions is being considered; the making of official decisions in writing; and the giving of reasons for decisions, at least on request by a party.[64]

Of these five suggested provisions, reasonable notice is already part of accepted common law, while the holding of full hearings where significant sanctions are involved is either indicative of the existing common law norm or amounts to advocacy of the undiscriminating use of court-like procedures in every case. Written and reasoned decisions would mark a change in the current common law position,[65] as would the adoption of a notice and comment procedure for rule making. Both may be justified; indeed, I will argue for a notice and comment statute later. However, neither necessitates a general administrative procedure act.

Of course, it is unfair to discuss the Law Reform Commission's proposals on the basis of an incompletely considered list. On the other hand, greater attention by tribunals to issues of procedure and an increasingly sophisticated common law may preclude the need for a general statute of this kind.

Some of the Law Reform Commission's more specific proposals certainly have merit. In particular, the pleas for greater ability on the part of tribunals to conduct paper or file hearings[66] and to delegate oral hearing functions to agency hearing officers have considerable attraction.[67] The latter phenomenon has long been part of American tribunal procedure and finds legislative expression in the U.S. federal Administrative Procedure Act of 1946, the provisions of which call for the appointment and use of hearing examiners by agencies.[68] These hearing examiners, or administrative law judges as they have come to be designated by Civil Service Commission Order,[69] form a professional cadre of experts in the conduct of administrative hearings and are a vital component of the U.S. federal agency

or tribunal system. However, as both American experience[70] and the Law Reform Commission's discussions make clear,[71] care has to be taken in developing an appropriate relationship between the hearing officer and the tribunal itself. This is particularly true with regard to such matters as the extent to which the tribunal is bound by the hearing officer's decisions; and the creation of systems of internal review or inspection that would ensure some consistency in the functioning of the hearing officer system.

Also of considerable merit is the Law Reform Commission's proposal in its working paper for an administrative law advisory body[72] or review council. Given appropriate appointments and a sufficient budget, such a body has the potential to perform an invaluable monitoring and control role over the procedures of federal administrative tribunals, and over the appointing of members to them. The limited success of the Ontario statutory powers procedure rules committee[73] is perhaps an unfortunate Canadian precedent, but the usefulness of such bodies is evidenced by the United Kingdom Council on Tribunals[74] and the Australian Administrative Review Council.[75]

As far as procedures are concerned, such an advisory body could be involved at the front end in the drafting of those parts of tribunal legislation and regulations dealing with procedures and, thereafter, as a monitoring agent assessing the appropriateness of the procedures imposed and the observance of them by the tribunal. In this way, the accountability and control features of a general procedural code might be achieved without the pitfalls involved in the drafting and application of such an act.

Staff Studies

Whether a tribunal is acting like a court to decide a one-on-one dispute or whether it is involved in an informally conducted, broad-ranging inquiry into a highly politicized matter, effective participatory rights necessitate access to all the known facts and contending arguments. Without this, real dialogue and contesting of the matters at issue are simply not feasible. Notwithstanding this, there has been a reluctance on the part of Canadian administrative tribunals to allow access to material and arguments gathered by their staff for use at hearings and for assistance in the making of decisions. The most regrettable consequence of this is that the more competent and more trusted the staff, the greater is the danger that the hearings themselves will become a charade because the real forum for the exchange of information and debate becomes the communication that takes place between staff and tribunal members.

No one would advocate that agencies dispense with their staff. Given the range and nature of the issues dealt with by many administrative tribunals, staff is indispensable. It is also in the public interest that such staff be competent and qualified. The real question is how to balance satis-

factorily the staff needs of administrative agencies against the demands of effective hearing processes. Generally, the arguments against revealing staff-agency communications cite the adverse effect that revelation would have on the frankness and candour of the staff-agency relationship. Alternatively, making such communications public might lead to a situation where they became oral rather than written. There is also the frequent assertion that revelation of staff advice would shut off entirely the exploration of radical options, since the knowledge that certain possibilities have even been raised can create public and media furor.

All of these arguments flow from a tradition of secrecy in administration, a tradition that may be a long time in dissipating. Nevertheless, with the advent of the federal Access to Information Act[76] and similar freedom of information legislation in some of the provinces,[77] some movement in the direction of more open government decision making has obviously been achieved. What now needs to be recognized explicitly is that freedom of information legislation is addressed to the general question of access and that, where hearings on particular issues are involved, greater access may be necessary in the interests of effective participation by those involved, subject, of course, to limited but necessary confidentiality exceptions.

There is, in fact, some recognition of this in the federal Access to Information Act in that other rules or principles of greater openness are expressed to prevail over it.[78] Moreover, as far as staff studies are concerned, there has recently been some movement on this issue by the courts. Not only have secret manuals and policies been condemned,[79] but there has been a somewhat grudging acceptance by the Federal Court of Appeal that, where staff provide relevant factual evidence to administrative tribunals and that evidence is not otherwise available to the parties, procedural fairness demands timely revelation.[80] Nevertheless, there has at the same time been a distinction drawn between factual evidence and staff identification of options and arguments and the giving of advice.[81]

Aside from the fact that clear distinctions between facts and advice may not be made all that easily at times, there is also the consideration accepted by a New Zealand court[82] some fifteen years ago that, in terms of influencing the final decision-making process, the advice of staff may be just as, if not more, influential than the factual data that the staff gathers. Given this, and assuming a desire on the part of tribunals that hearings be of use to the decision-making process, it would seem evident that tribunals would strive to find ways of conveying staff advice and identification of options to the parties at the hearings. This can be achieved either by accepting access to staff studies or being willing for their staff to testify as witnesses at hearings. Indeed, to the extent that new options become manifest after the conclusion of public hearings, fairness would seem to involve an opportunity for the parties to comment on these as well.

While this matter is probably best handled in a manner that suits the particular working arrangements of individual tribunals, there may be a

need for legislative action if tribunals do not move voluntarily in this direction. Or, perhaps more usefully, the task of ensuring rules for the timely disclosure of staff studies could be placed within the mandate of the administrative review council recommended in the previous section of this paper.

Rule and Policy Hearings

Somewhat beyond the scope of this paper is the question of whether there needs to be a statute obliging rule makers to give notice of all proposed rules and an opportunity for members of the public to comment on the proposals: the "notice and comment" procedure of section 553 of the U.S. Administrative Procedure Act.[83] However, in the context of considering the hearing obligations of administrative tribunals engaged in rule or policy formulation, it is worthwhile to record some of the arguments in favour of such an obligation, whether enshrined in a general statute or not.

First, to the extent that it is inevitable that many important rules and policies will be developed outside the regular parliamentary process through the agency of delegated legislation and other rule-making powers, some substitute for the parliamentary process surrounding the enactment of primary legislation must be found. In this sense, notice and comment procedures have a democratic appeal in that they provide a surrogate for legislative and committee debate by allowing for direct public participation. Obligatory notice and comment procedures also provide the possibility, if not the guarantee, that participation in the drafting of rules and policies is open to all rather than simply being the prerogative of certain well-placed lobbyists. In terms of the jargon of the area, it may serve to lessen the possibility of regulatory capture — the domination of the decision maker by those whom it is designed to regulate. Moreover, aside from these participatory values that notice and comment procedures may enhance, there is also the likelihood that the participation generated will produce better rules and policies than if the process remained a closed or semi-closed one.

These are arguments that are relevant whatever the rule- or policy-making agency involved. When administrative tribunals are considered specifically, another problem intrudes. One way in which an administrative tribunal makes rules and policies is by developing them in the context of an individual adjudication or series of adjudications. To the extent that hearings are held in the course of these adjudications, there is an assurance of some constituency participation in the process. However, to the extent that individual adjudications may attract only a limited range of participants, the constituency input may be distorted.

What this indicates, at least in some contexts, is the desirability of agencies moving their rule and policy making from the context of individual

adjudications to separate proceedings at which the whole constituency can potentially be heard from.[84] Indeed, even if tribunal adjudications at which policies will be decided do attract an adequate level of participation, there may still be room for policy- or rule-making hearings. The rules or policies developed in the context of individual adjudications will generally be random, and generated by the exigencies of the particular adjudication. Yet, if full participation is accepted there, then it must also be accepted when more general rule or policy making is involved.

However, this is not meant to suggest that all tribunal rule or policy making should be attended by adjudicative-style or trial-type hearings. Already noted have been the paralyzing excesses caused by the adoption of the trial-type process for rule making by certain U.S. administrative agencies. Rather, what should be guaranteed as a minimum is the paper-style notice and comment procedure contemplated by the U.S. Administrative Procedure Act. Indeed, to mandate other than that could discourage agencies from engaging in valuable rule- and policy-making exercises.

What this leads to is the proposal that administrative tribunals should be part of, and not exempted from, any general notice and comment legislation. Failing that, and in the absence of consistent tribunal adherence to notice and comment procedure, the Law Reform Commission's suggestion of a special statutory provision should be accepted.

Political Appeals

Given that there is a continuing place for appeals to the Cabinet or a minister of the Crown from certain regulatory decisions, there are questions about the extent to which the political appeal or review process should be conditioned by procedural safeguards.

Aside from any crises of confidence that political reversal causes in the administrative tribunal, the disappointed parties will inevitably believe that earlier participatory rights have been for naught. Instead, it will be believed that crass political considerations have overridden the carefully reasoned position of the administrative tribunal, and that hidden and more powerful lobbies have been at work in a way not permissible before the administrative tribunal. This will be particularly so in individualized processes such as the reversal of a decision involving the grant of a licence.

At the same time, however, the legislative adoption of a political appeal route involves a recognition that matters of overriding political (in its best sense) concern might on occasion dictate the reversal of a tribunal decision. Politics in that sense are an accepted part of the system. In the case of appeals to Cabinet, it is also obvious that the realities of present-day government make it virtually impossible to think of parties having a right to appear personally before Cabinet or for that matter to submit written material directly to Cabinet. Our traditions of Cabinet functioning also

probably dictate that the Cabinet be entitled to take advice from the relevant minister and senior civil servants without that advice being revealed to the affected constituencies.[85]

Nevertheless, to preserve some of the integrity of the decision-making process and, perhaps more importantly, to ensure that Cabinet and ministers have access to the competing evidence and contentions, some procedural safeguards are necessary. At the very least, all parties to the regulatory proceedings under appeal or review should have timely access to, with an opportunity to comment on, the briefs submitted by the other parties. While giving no guarantee that those comments would ultimately find their way into the material placed before the Cabinet or the minister, it at least brings them to the attention of those preparing the relevant Cabinet or ministerial document and advice. To the extent that the tribunal itself is also submitting material for consideration, this should also be available, at least where it involves matters not dealt with in the tribunal's decision. Finally, an argument can also be made for providing access to material generated within the relevant department, particularly to the extent that it introduces new considerations into the decisional process.[86]

Once again, this is a matter that could be dealt with either by direct legislation or by leaving the formulation of appropriate procedural standards to the proposed administrative review council.

Conclusion

In this section, not all the various procedural issues surrounding administrative tribunals have been discussed. Omitted have been, for example, such things as the duty to provide reasons; the summons, search and seizure powers; and the enforcement powers of tribunals. Rather, in highlighting certain issues, a number of vital aspects of the procedural question have been emphasized. In particular, while the adjudicative, trial-type model of hearing is properly confined in its application to administrative tribunals, the reasons for restricting its use do not negate some important arguments that a core of procedural protections should be in place when broader policy or political questions are being resolved by administrative tribunals.

Indeed, some procedural protections that are not presently part of the accepted currency of trial-type procedural thinking can be asserted as important components of tribunal determination of broader policy and political questions. These would include, for example, access to staff advice and opinions, and notice and comment for all rule and policy development. The reasons for these procedures are, however, somewhat different from the reasons for certain aspects of true trial-type procedures in adjudicative hearings.

In conferring significant policy development roles on independent administrative tribunals, certain issues have been removed from the

mainstream of the political process. Unless we are also prepared to accept a surrender of all accountability for what those agencies do, devices must be developed for ensuring some measure of responsibility on their part. One such device is the assurance of public and constituency access to the policy development roles of those tribunals. Through openness of the process and other requirements (such as a duty to articulate reasons for decisions), the functioning of administrative tribunals would be subjected to public scrutiny. The discipline imposed on tribunals in such an environment may be as important as any of the more direct forms of accountability imposed on statutory authorities. It is in this context that the proposals for guaranteed procedural protections for policy-making tribunals must be seen.

Accountability and the Administrative Process

During the past decade or so, observers of the Canadian administrative process and federal regulatory agencies in particular have become increasingly concerned with the overall structural design of the system, and especially with issues of accountability. In some quarters, there has been an abiding concern with the lack of coherence in our regulatory system. This system is not the outcome of a controlled design. Rather, it evolved and, in its evolution, has produced various warts and excrescences antithetical to systematized planning.

As well, some critics of the present arrangements continue to be troubled by the alleged constitutional impurity of our major regulatory agencies. On the one hand, how can there be an independent, judicial adjudicative body which is subject to directions from, or appeals to, the executive arm of government? On the other hand, how can primary responsibility for such major policy issues be shifted from Parliament and the executive to bodies which are not politically accountable or responsible,and subject only in isolated cases to the limited correction of Cabinet review?

These concerns have manifested themselves in a variety of proposals, some of which will be examined in this section. For some, the abolition of Cabinet appeals and existing directive powers is the panacea for the constitutional anomalies of the regulatory agencies. Sometimes, this is accompanied by suggestions that agencies should be divested of a significant portion of their policy-formulation role and resume a limited policing,[87] or strictly adjudicative role. For others, the answer is greater use of directive powers and/or Cabinet appeals and perhaps also a strengthening of the parliamentary committee system, so that tribunals may become more accountable and responsive to our elected representatives who, within our system, are primarily responsible for policy choices. These proposals are also generally associated with pleas for the retention or strengthening of the authority of the Governor in Council (rather than the authority of the agency) to promulgate subordinate legislation.[88]

A perceived need for systematization and standardization of the regulatory process has also produced the arguments for standardized adjudicative and rule-making procedures that were identified in the previous chapter. Standardization of methods and terms of appointment is also regarded as desirable.

Some of these proposals are discussed in this section. Before doing so, two vital points need to be made. First, the ad hoc, unsystematic growth of our administrative process may not have been a bad thing. Complete standardization and systematization may not be needed as correctives to the current situation. Without subscribing wholeheartedly to the theory that we get the administrative process that we want, and that any attempt at systematization and standardization is counterproductive, I believe there is much to be said for a deterministic, incrementalist, pluralistic view of the administrative process.

The tribunals we have and their relationship with other parts of the governmental process are the products of perceived necessities at the time of their creation. As well, they are part of a political process that is largely capable of appropriate modification to respond to changing demands and conditions.

Another aspect of this argument was well stated by Professor Ed Ratushny of the University of Ottawa in commenting on a paper that was mainly concerned with a demand for greater order and consistency in the regulatory system:

> Each tribunal is different and is *meant* to be different. The very existence of separate administrative bodies is a recognition that there are unique functions to be exercised which cannot be exercised as effectively either by the ordinary departmental structure or by the courts. To insist upon uniformity in the relationship of tribunals to government may simply defeat the very purpose of selecting and/or developing a unique but effective existing relationship.[89]

This is not meant to suggest that there is no purpose in considering system-wide issues or prospects for improvement. It is meant to urge caution in evaluating suggestions for universal panaceas. The regulatory process covers a diverse area. Even if a particular regulatory regime is not created in the same way as we would have it if we were starting from scratch, it is important to realize that, as an existing organic body it has a history, and it also consists presently of a complex series of interrelationships between various actors that, warts and all, may have produced as satisfactory an accommodation of competing interests as could be hoped for.

The second point is that much of the constitutional and political theory upon which some of this argumentation is based is outmoded, unrealistic, or both. An examination of a few of the propositions advanced by some proponents of change should quickly reveal why.

Perhaps most deceptive in this regard is the notion that administrative

agencies are not politically accountable, while Parliament and Cabinet are. Any theory of accountability based upon the electoral process and the answerability of Cabinet and individual ministers in Parliament is almost completely divorced from the realities of present-day Canadian political life. While from time to time the parliamentary process may provide a forum for the embarrassment of the government of the day or individual ministers, in reality it seldom forces change on an all-powerful Cabinet. Moreover, many of the most volatile issues in Parliament never even surface, let alone play a critical role by the time the next election comes around. Elections in fact are fought more and more on the basis of media hype and immediate causes rather than evaluations of past performance. After all, what ever happened to Canadair and the Maislin bailout in the 1984 federal election campaign?

For some this may present an exaggerated view of the parliamentary process, particularly in failing to take sufficient account of the day-to-day pressures on the government generated by the opposition, constituency interests, lobbyists, and the caucus. Nevertheless, the existing administrative process is capable of providing equally, if not more, effective channels of accountability than Parliament. With major regulatory agencies, there are checks imposed by Cabinet appeals, Cabinet directives in some cases, and the role of the Courts. Moreover, as Andrew Roman and Richard Schultz suggest,[90] the high visibility, openness and public participation characteristic of most regulatory agency hearings stand in rather stark contrast to the confidentiality of much regular government decision making. As well, in this day, the media are as sensitive to the issues dealt with by the major regulatory agencies as to the other activities of government in general and of Parliament in particular.

To put it bluntly, the electoral process does not ensure appropriate levels of accountability. If it is defined in terms of responsiveness to the moulding influence of public opinion and the requirement that actions be justified in a public and open forum, then accountability may be more truly present in the processes of so-called independent regulatory agencies than it is in the regular processes of Parliament and executive government.

The notion that independent regulatory agencies are constitutional pariahs is also out of accord with the reality of our constitutional arrangements. For some, there seems to an untouchable sanctity about the theory that the government of Canada is that of a federal state modelled on the British tradition of responsible parliamentary government but refereed by the courts to the extent that they resolve disputes between the various units of the federation. If this ever was the model for Canadian government, it is not easily found in the Constitution Act, 1867. There the emphasis is on legislative power with bare references to an executive, and there is a difficult extrapolation involved in creating a guaranteed role for the judiciary out of that document. Rather, if this parliamentary model ever existed, it was a combination of the accepted perceptions of the British

model moulded by the evolutionary forces of time and local conditions.

If one, therefore, accepts a growth theory of constitutional norms (and, after all, who would say that the Constitution Act, 1867 today describes adequately the present, real constitutional relationship between the federal government and the provinces?), then the administrative agency in our present-day regulatory state is entitled to legitimacy in a constitutional sense. Moreover, once this is acknowledged, administrative agencies can be dealt with in terms of their appropriateness as instruments of regulation without, at the same time, struggling to justify their existence in terms of a specious constitutional model.

It is on these terms that I will now turn to the question of agency accountability and proposals for improving it. The six particular issues that will be considered are:

- political appeals;
- political directives;
- parlimentary checks;
- regulation-making authority;
- the appointments process; and
- public participation.

A separate and final section will be devoted to the role of the courts.

These seven issues achieve their greatest relevance with respect to broad, policy-oriented regulatory agencies. The further along the spectrum one proceeds toward the truly adjudicative, individual, one-on-one, dispute-resolution tribunal, the less one is concerned with most of these methods of accountability. Here, political appeals and directives and parliamentary checks are obviously inappropriate, regulation-making authority irrelevant, and participation by the general public a dubious claim in most instances.[91] The only exceptions are those of judicial checks on excesses of jurisdiction and breach of procedural fairness obligations, and protecting the integrity of the appointments process that it ensures adjudication by fair, impartial, and independent adjudicators as provided for in the norms established by the common law rules respecting bias, and more recently and significantly by the Canadian Bill of Rights[92] and the Canadian Charter of Rights and Freedoms.[93]

Political Appeals and Directives

Even a cursory examination of the literature of recent years on the structure of regulatory agencies in Canada reveals that the issues of greatest concern have been the parallel devices of Cabinet appeals and Cabinet directives as means of ensuring accountability. A slightly more detailed survey of the various reports and academic articles on these matters indicates a "majority" view favouring the abolition of the Cabinet appeal and its replacement by greater use of directive powers. The view of most of this

group is that a directive from the Cabinet should be attended by certain procedural obligations. The most common suggestions would involve the administrative agency itself, which would be instructed to engage in a process of public notice and comment on the subject of the proposed directive.[94] In addition to the majority view, however, arguments can be found for all the variations ranging from neither Cabinet appeals nor directives[95] to both Cabinet appeals and directives.[96]

Foremost in the arguments of the majority position are assertions of the need for some manner of political control over administrative agencies. In particular, directives serve the potentially important role of enabling the government of the day to impose on agencies general policies of transcending importance, in order to bring the agencies within coordinated thrusts in certain matters. An example of this is the recent situation in which federal agencies were given direction as to the government's policy on wage and price controls. At the other end of the decisional process, Cabinet appeals permit an after-the-event adjustment of agency decisions to make them correspond with overriding government policies.

Against these important considerations must be balanced the threats to agency credibility and self-confidence as well as participatory values posed by a system of Cabinet appeals. Directives coming before the event do not affect directly the expectations of those involved in a regulatory application and, if coupled with participatory rights, give some measure of assurance of public involvement and also that the process of issuing directives will not become crassly political. The involvement of the agency in the directive-formulation process is also seen as lessening the threat to its independence and integrity.

The directive power, however, is not without its problems. Some would advocate that the directive power be extended to allow intervention by Cabinet at any stage during a regulatory proceeding,[97] but then the credibility of the regulatory process might be threatened as much as it is by Cabinet review of decisions already taken. Indeed, even outside the context of a particular proceeding, a sufficiently specific directive would also have that tendency if seen as aimed at a pending proceeding. Incidentally, Andrew Roman discusses the difficulty of formulating directives that are sufficiently specific to be of some use but not so specific as to be seen as determining pending applications.[98]

A somewhat speculative possibility, but one that nevertheless has the potential to cause severe disruptions to the regulatory process, is that the creation of a directive power would transfer effective regulatory authority from a relatively responsible forum to one not so responsible. This argument is most clearly articulated by Professor Richard Schultz:

> It is believed that regulatory agencies, today at least, are far more responsive to a more diverse cross-section of interests than are departments. The thrust of the argument is that the bureaucratic process is far too confidential and

> dominated by the norms of clientalism than is the contemporary regulatory process. The regulatory process, for both statutory and judicially enforced reasons, is increasingly far more open and to a far more diverse group of affected interests than the departmental process. [A directive power] will simply transfer the discretionary adjustive process from what is, comparatively speaking, largely a public process, whatever its flaws, to a private process.[99]

Schultz does, however, concede that undesirable bureaucratic control could be avoided and desirable political control put in place if the power to issue directives was conditioned on the opportunity for public input by the agency and the public.[100] Frankly, however, I see problems even with this. The fact that the Cabinet has the ability to issue directives (whether surrounded with procedural safeguards or not) will mean that the relevant department will become a forum for the initiation of lobbies for particular directives. The regulatory battleground will by virtue of that alone become more widely dispersed and this has the potential to cause various public interest groups to spread their limited resources even more thinly either by becoming initiators of such lobbies or, more likely, as resistors to such lobbies. Moreover, once a directive is suggested, a process of notice and comment engaged in by the agency itself gives no assurance against off-the-record contacts between various lobbies and the department within which the decision will ultimately be taken.

All of this leads me in the direction of Andrew Roman's position. That is, if directives are to be given, they should be issued through the somewhat more difficult and open process of primary legislation, or not at all.[101] However, I also think that it is important that options not be foreclosed in the development of regulatory structures. The complete rejection of either Cabinet appeals or directives is not a position I would advocate. In the case of Cabinet appeals, I would, however, be most reluctant to support a departure from the procedural protections detailed in the previous section. In the search for accountability of regulatory agencies, the solution may be more readily found in maximizing public participation rather than in returning power to Cabinet or Parliament.

Parliamentary Checks

Without a significant political will on the part of the governments of the day, it is difficult to visualize Parliament or the provincial legislatures becoming more significant formal actors in ensuring the accountability of administrative agencies.

It seems to be the accepted wisdom that the legislatures could be more careful to specify the objectives, mandates and policies of the administrative agencies they establish. However, in the fluid world of the areas regulated by the major agencies, there are obvious dangers in too great a specificity and, in particular, the brake that such language might place

on the ability of agencies to respond imaginatively and flexibly to new situations.

Parliament and particularly parliamentary committees do present an opportunity for annual public examination of the activities of tribunals. Indeed, few would question the desirability of subjecting the financial affairs of administrative agencies to the scrutiny of the Auditor General and the appropriate parliamentary committee. However, without additional resources, it is highly questionable how effective parliamentary scrutiny of the financial affairs of regulatory agencies can be, let alone any examination of their policies and decisions. Even accepting that more could be done usefully without additional financial resources, the evidence is that the rigours of party discipline even in committee often hinder effective evaluation and criticism of agency performance, and frequently reduce the annual appearances to a wrangle on the issue of the moment. Similar considerations also bring into question the value of tabling agency regulations and the sometimes-proposed negative resolution procedure for the approval of such regulations. If used, this too might turn out to be just another opportunity for fractious and generally irrelevant party debate.

In the absence of any demonstrated intention to reform the parliamentary process at the expense of executive power, I will refrain from further comment on the role of Parliament or the legislatures as a control or accountability mechanism for administrative tribunals.

Regulation-Making Authority

It is a feature of most legislation establishing major regulatory agencies, and tribunals generally,[102] that authority to make subordinate legislation respecting the mandate of those agencies is conferred not on the agency itself but on the Governor in Council or Lieutenant Governor in Council. For many commentators on the Canadian administrative process, this has appeal as a desirable check on the unruly tendencies of tribunals; the necessity for Cabinet endorsement of suggested subordinate legislation increases accountability.

I question the validity of this argument. While there may be no objection to Cabinet having a regulation-making authority under regulatory statutes, this does not mean that the agency should not have regulation-making authority as well. Even without that formal authority, agencies engage in rule making anyway. Indeed, it is part of generally accepted regulatory theory that it is often better to proceed by way of general rule making than to allow rules to develop incrementally in the context of particular adjudications.[103] There are, however, two major problems with the present situation: (a) the lack of an explicit power to make rules may act as a disincentive to engaging in this worthwhile exercise; and (b) the legal status of rules made without express authority is uncertain, to say the least,

particularly after a recent Supreme Court of Canada decision.[104]

Given both these considerations, I am of the view that agencies engaging in significant policy development functions should be given authority to make subordinate legislation and, in this regard, section 22(2) of the Canadian Human Rights Act serves as a commendable model.[105] It authorizes the Human Rights Commission to issue binding guidelines which will be applicable in individual adjudications till revoked. Given the adoption of a notice and comment procedure of the type suggested in the section on procedures, there are no real reasons for the denial of such authority to agencies. However, if a safeguard is wanted, I have no objection to a provision that would give regulations of the Governor in Council or Lieutenant Governor in Council priority over those adopted by the agency.

Appointment Process

The Economic Council of Canada,[106] the Lambert Commission,[107] the Peterson Committee[108] and the Law Reform Commission of Canada[109] have each indicated concern with the current processes for appointments to administrative tribunals. To put it bluntly, as none of them was quite prepared to do, if political patronage has been common recently in the appointment of members of the judiciary, it has been rampant for years in the naming of members to administrative tribunals. Is this a problem?

In my view, political or policy preferences as such should not be an impediment to appointment to an administrative tribunal. The furtherance of the objectives of the legislation is a legitimate consideration in the naming of members to serve on administrative tribunals.[110] Similarly, the appointment process represents an opportunity to encourage the debating of shifts in regulatory policy and initiatives during the life of an administrative tribunal in a somewhat less direct but no less acceptable way than Cabinet directives or legislative amendment. Moreover, in individualized decision making, the common law rules against bias, and the provisions of the Canadian Bill of Rights and the Charter act as a brake on the participation of those potentially overdisposed toward a particular outcome.[111]

However, the current system does not ensure competence; nor does it ensure, where there is no protection from arbitrary removal, that there can exist the confidence to exercise one's competence without fear for one's position. Also, the processes by which appointments are made do not ensure that a sufficient number of those qualified to be members are given serious, or any, consideration for the positions in question.

There is great merit, therefore, in guaranteed terms of office with removal only for cause,[112] the advertising of available positions, and the writing of job descriptions for members. There is merit also in the proposal to create a body such as an administrative review council to advise on appointments and to monitor the appointments process for undue political

patronage and the achievement of reasonable balance in multimember, major regulatory agencies.

Public Participation

Public participation in regulatory proceedings could be an avenue of accountability that would serve to deflect the criticism that elected officials are accountable but appointed agencies are not. There are, however, seductive lures to public participation that may also distract its proponents from reality. In the previous section on procedural issues, I raised the possibility that excessive participatory rights might paralyze the administrative process. The more a tribunal allows in, and government or tribunals provide funds for, public participation in regulatory proceedings, the greater that danger becomes. Professor Hudson Janisch, writing of his experiences as chairman of the Regulated Industries Policy Board of the Consumers' Association of Canada, puts these very questions succinctly:

> Will fidelity to pluralism compel more and more interest group representation until all cancel each other out? Will the regulatory process be capable of handling all interest group representation?[113]

Janisch then concedes that, in reality, public interest representation probably will not go this far. Then he raises another spectre: that public interest representation, which is an expansion of those participating in the regulatory process, is not really public interest representation at all but the admission of new elites with special interests who can afford to participate. Putting it another way, conventional lobbying may be a much cheaper process, and may enable more to participate, than will lengthy, complex regulatory hearings.

Government funding of various interest groups may overcome some of these concerns. Nevertheless, such funding is not statutorily guaranteed and, even if it were, its continuity and sufficiency would be uncertain, particularly given the pressures for government fiscal restraint. Janisch also notes the earlier concerns of Professor Michael Trebilcock[114] about another potential problem with government funding of public interest groups, namely, that a fear of funds being cut off will discourage the advancing of radical ideas or challenges to the system. Participation completely within the rules becomes the required behaviour under this view.

This does not mean that increased participatory rights have been a bad thing. Indeed, there is reason to be suspicious of claims that less well-off groups achieve more through cheaper informal lobbying than through formal hearings. However, those considerations do serve as a caution that participatory rights and open processes are not a guarantee of regulation in, or even representation of, the public interest. Accordingly, as an accountability device, participatory rights should not be considered a complete panacea for the deficiencies of other such devices.

Summary

Accountability of administrative tribunals has been associated too often with the notion of control by or responsibility to Parliament or the executive, as if that were a necessary prerogative of our system of representative government or constitutional theory. The basic argument of this section has been that an approach to the question of accountability simply from this perspective is misguided in that it both flies in the face of constitutional and governmental realities and prevents a consideration of the effectiveness and availability of other avenues of accountability. In particular, many of our administrative tribunals are already as publicly accountable, if not more so, than the parliamentary, executive or judicial branches of government.

Of course, this does not mean that administrative tribunals should be left alone, or that notions of accountability to the Parliament and executive are outmoded and unnecessary. Rather, it is a plea to regard all such devices as among a number of instruments of accountability which are alternatives from a systemic standpoint and not from any blinkered view of our constitutional history.

In particular, the freeing of accountability discussions from constitutional restraints may enable the acceptance of the idea that universal solutions to the perceived problems of the administrative process are not the answer. Rather, there is a range of options available which can be tailored to the imperatives of particular regulatory tasks. Under such an analysis of the problem, the values of the system then become, not obsolescent constitutional and governmental theory, but better decision making in the public interest. This can be achieved through recognition of participatory rights and the creation of an environment in which competing interests can be evaluated properly.

The Courts and the Administrative Process

In the mid-1940s, judicial scrutiny of the administrative process was sporadic, and was mostly in the context of statutorily created appeal rights.[115] Moreover, it appeared to be not at all out of sympathy with the aims of the legislative regimes of the time. Writing recently of the 1930s and 1940s, administrative lawyer and legal historian Professor R.C.B. Risk commented:

> The courts continued to decide only a few cases involving regulation, and to be generally willing to respect administrative powers and probably more willing than the Privy Council.[116]

In a sense, this deference toward administrative regimes in the 1940s is somewhat surprising, given that it was the poor performance of the courts in certain substantive areas, such as labour relations and human rights,

that was providing the fuel for the creation of administrative regimes. Perhaps it was that the courts were willing to defer to the administration at a time when the powers of the government were comparatively limited and the jurisdictions of the courts were not being threatened. Indeed, this deferential posture on the part of the courts did not survive the establishment of labour boards.

Since the 1940s, the situation has undergone a number of changes. In particular, there has been a remarkable increase in the level of judicial review proceedings in the regular courts. The leap in the number of administrative agencies and tribunals also has involved an increase in the number of statutorily created appeal rights. At the same time, an explosion in the number of lawyers and the emergence of proceduralism has contributed to the far more frequent invocation of the courts as correctives for the administrative process.

In addition, the matters at stake in the administrative process have become much more significant economically, so that the costs of judicial review and the utilization of every conceivable avenue of "getting the right decision" have seemed worth it. For a period, at least, this was encouraged by a perception that the courts provided an antidote to the socialist tendencies of administrative regimes and their members. "The citizen's bulwark against arbitrary government action" could have read "the corporate world's ultimate weapon against the increasingly collectivist and welfare state."

This latter phenomenon manifested itself most dramatically in the field of labour relations so that, by the late 1960s and early 1970s, judicial review of administrative action was being given a bad name in this country in the academic teachings and writings of a number of labour lawyers.[117]

Starting with the abolition of appeals to the Judicial Committee of the Privy Council in 1949, the Supreme Court of Canada had rendered judgment in a number of important labour law decisions. According to the critics, it had demonstrated, if not outright antipathy toward labour relations legislation, at least a general lack of understanding of its objectives. When this was coupled with the fact that part of the reason for the establishment of collective bargaining statutes and labour tribunals in Canada had been the inept performance of the courts in this area, it is not surprising that there arose from some quarters vigorous calls for the enactment of stronger privative clauses in empowering statutes aimed at cutting off the judicial review route entirely.

In at least one jurisdiction, British Columbia, such a privative clause was in fact attempted, though its effectiveness was never really tested judicially.[118] Now, however, any further legislative exercises that would cut off access to the regular courts by way of judicial review from the decisions of administrative agencies and tribunals have been thwarted by the Supreme Court of Canada. It held, in 1981, that judicial review of administrative action for jurisdictional error is constitutionally protected

from removal, at least at the hands of the legislatures.[119] Two years later, in 1983, that same constitutional principle seems to have been applied to the federal Parliament.[120] Thus, unless there is a constitutional amendment, the courts are the ultimate supervisors in our system of the jurisdiction of statutory authorities.

Given the choice, should it be otherwise? In the evolution of judicial review of administrative action in Canada, it is ironic that the Supreme Court is announcing the constitutionally protected position of judicial review of administrative action at the same time that it is showing itself more sympathetic to the labour relations process from which came so much of the earlier criticism. In short, the Court has narrowed dramatically the ambit of review for jurisdictional error in a labour law context, and generally subjected applicants to the heavy onus of demonstrating that the labour board or arbitral decision under attack was patently unreasonable in its interpretation of the labour statute or terms of the relevant collective agreement.[121]

Also significant in this regard are the fate of two legislative provisions enacted in Ontario and federally at the beginning of the 1970s. At the very time when the critics of the Supreme Court's performance in the review of labour decisions were beginning to gather momentum, the McRuer Commission, with its "rule of law," judicial review–oriented approach, was reporting in Ontario. Moreover, and most unusual for commissions, it was having its recommendations enacted into legislation. One of the legislative products was the Judicial Review Procedure Act which, in its provisions for error of law and absence of evidence review, seemed to be introducing greater opportunities for judicial review of the substance of administrative decisions.[122] The same potential also apparently existed in section 28 of the Federal Court Act,[123] the statute by which the federal Parliament transferred general judicial review power over the affairs of federal statutory authorities from the provincial superior courts to the Federal Court of Canada. More than a dozen years later, the fact is that the error of law and absence of evidence provisions in those two statutes have created scarcely a ripple in the scope of court intervention in the affairs of Ontario and federal statutory authorities.

Indeed, there is a further irony in all of this. The recent so-called deferential approach of the Canadian courts to the substance of tribunal decision making, particularly in the labour area, finds at least some of its origins in the U.S. law in the same area. However, at the same time that Canadian courts appear to be moving in the direction of the American approach to judicial review, there has been something of a countermovement in the United States. As part of the deregulation philosophy in the United States, with its call for placing the agencies under Congressional control, there have been suggestions that the courts need to be brought into the act much more dramatically. Most instructive in this regard is the proposed Bumpers Amendment to the Administrative Procedure Act of 1946, a version of

which almost became law in the 97th Congress of 1982.[124] The purpose of the amendment was to give an order to the U.S. federal courts countermanding the deferential approach they had developed in their common law toward agency decision making:

> To the extent necessary to decision and when presented, the reviewing court shall *independently* decide all relevant questions of law, interpret constitutional and statutory processes, and determine the meaning or applicability of the terms of an agency action. . . . In making determinations concerning statutory jurisdiction or authority under subsection (a)(2)(C) of this section, the court shall require that action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute, or in the event of ambiguity, other evidence of ascertainable legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action, but in reaching its independent judgment concerning an agency's interpretation of a statutory provision, the court shall give the agency interpretation such weight as it warrants, taking into account the discretionary authority provided to the agency by law.[125] [Emphasis added]

And so the pendulum swings!

Before leaving the history of judicial review, something should be said about review on the grounds of procedural fairness or natural justice. Some have asserted that, just as over-intervention in the substance of tribunal decisions characterized the activities of the courts in the 1950s and 1960s, over-judicialization of the administrative process has been the characteristic of the courts' review of tribunals in recent years. There are, of course, serious questions that can be raised about the degree to which administrative decision making has been judicialized. Does it have a tendency to paralyze the process of decision making? Does it frustrate the efficiency and the delegalizing objectives of tribunal creation by the introduction of lawyers and inappropriate court-like processes to the operation of administrative agencies? Do fair procedures really contribute to better decision making? Is the cost of fair procedures really justified in the sense that every dollar spent on a hearing may be a dollar less spent on government largesse?

To the extent that these are problems in the era of proceduralism, it is difficult to lay the blame for over-judicialization at the door of Canadian courts. It is true that since 1978 and *Nicholson* it has become easier to convince a Canadian court that a particular decision maker is obliged to afford a modicum of procedural decency before rendering a decision.[126] However, before that, the state of the law was disreputable, to say the least. Procedural claims tended to be decided on the basis of 19th century notions of property rights, with various regulated segments of society, such as prisoners and immigrants, having great difficulty in asserting before the courts any kind of claim to procedural protections.

The decision of the Supreme Court of Canada in *Nicholson* in 1978

at least had the effect of recognizing in the area of loss of employment what Charles Reich had identified as early as 1964 in his *Yale Law Journal* article, "The New Property"[127]: the legitimacy of the claims of those members of society to whom property was not so much land ownership but jobs, attendance at school and participation in various welfare schemes such as government-subsidized accommodation. At the same time, an increasingly active corrections law bar was also convincing the courts that prisoners did not lose all rights and claims to procedural protection upon sentence to a term of incarceration.[128]

In fact, this change in approach was neither radical nor expansive. The message of *Nicholson* and like cases is confined largely to instances of individually oriented decision-making processes: a hearing claim is made by someone who has lost a job, been turned out of government housing or been transferred to another penitentiary. So far, the Canadian courts have proved unwilling to impose hearing procedures on rule-making or policy-making functions, and there remains a reluctance to accord standing or procedural rights to groups wishing to participate in policy-making processes or to intervene in proceedings involving applications by or proceedings against individuals or corporations which are claimed to have broader public interest ramifications.[129]

In this regard, legislation and the voluntary actions of government departments and administrative agencies themselves have been far more responsible than the courts for the 1980s procedural revolution. Therefore, insofar as these developments are considered deleterious, it is not appropriate to saddle the courts with too much of the responsibility.

Against this background, the questions raised are whether it is appropriate for the courts to have review authority over the administrative process; and, if so, how that review mechanism should be structured both in terms of available grounds for review and the process through which review is undertaken.

Given the recent decisions of the Supreme Court of Canada, the complete abolition of section 96 court review processes now would seem to require a constitutional amendment. Aside from the controversy and the difficulties such a proposal would create, it is dubious whether such a decision could be justified.

Do the courts have any special claim to the last word on whether an administrative tribunal has transgressed the limits of its jurisdiction? There is no inevitability about the existence of such a state of affairs. Nonetheless, in the Canadian context, certain choices have been made about the role of courts in our system of government and, while it might be argued by some that the courts' jurisdiction over issues of constitutionality and the jurisdiction of administrative tribunals are court-assumed roles rather than the product of deliberate constitutional choices, the fact remains that, as recently as the Canadian Charter of Rights and Freedoms, our polity — in section 24(1) of that document — has chosen the regular courts as the

appropriate forum for the raising and adjudication of Charter disputes.[130]

It is also part of our political and cultural heritage that we look to judicial review as a protection against arbitrary, mindless or unconstitutional (in its broadest sense) behaviour by statutory authorities. Whatever the rights and wrongs of judicial involvement in the field of labour relations in the 1950s and 1960s, that same era also produced *Roncarelli* v. *Duplessis*[131] and its reaffirmation of the rule of law in its very best sense; not even the premier of Quebec could claim a general overriding or dispensing power to act in the perceived best interests of the province.

It is also important to note that in matters of professional discipline, as much as in matters of major regulatory involvement, there continues to be a legislative expression of confidence in the role of the courts in the form of statutory appeal rights, even if they are confined to law and jurisdiction. In this respect the labour field, with its extensive privative clauses, is the exception rather than the rule.[132]

Professor Peter Hogg,[133] in an article surveying the administrative law performance of the Supreme Court of Canada from 1949 to 1969, captured the essence of appropriate judicial review of administrative action. He stated it in terms of the abilities of the courts to keep tribunals in check when, in the context of their comparatively narrow delegations of power, these tribunals made decisions which came into conflict with broadly accepted societal goals and with libertarian values transcending the authority and expertise of the particular regime.

It is necessary to have an adjudicative system in place for situations where the decisions of a statutory authority conflict with or transgress more important values in our society, or where two statutory authorities purport to occupy the same field in conflicting ways.

Of course, this does not necessarily mean that we should continue to accept the current adjudicative structure. Over the years, there have been arguments made for a special system of administrative courts such as the Conseil d'État in France,[134] or the Commonwealth Administrative Appeals Tribunal in Australia.[135] Indeed, limited experiments in that direction have taken place with the Ontario Divisional Court; and the Federal Court of Canada is largely a public or administrative law court. However, without precluding the possibility of further experimentation and structuring in this direction, when one comes to the Supreme Court at the apex of the Canadian adjudicative system, it is clear that it too, like the U.S. Supreme Court, is becoming increasingly a public law court. Moreover, with the advent of the Charter of Rights on the docket of the Court, it is inevitable that this tendency will accelerate. Given those circumstances, and the sense that it reflects that public law issues are generally the most deserving of the highest court's attention, it is difficult to see the case for a parallel court dealing with administrative law matters. The need is not there, and the credibility gap inevitable in the teething difficul-

ties of any new court system would undoubtedly be interpreted as diminishing administrative law issues in importance at the very time when the existing court structure has moved in the opposite direction.

Confronted with similar constitutional problems to those of Canada, the Commonwealth of Australia has created an administrative appeals tribunal as an intermediate step in the process between decisions of statutory authorities and judicial review in the regular courts. Two particular comments on this structure are warranted. First, while the actual intention was to make the tribunal a general appeal body from all Commonwealth statutory authorities, that ultimately proved not to be feasible, and some authorities are excluded while others continue to have their own statutory regime. Secondly, in some cases, the presence of this intermediate step before access to the Federal Court of Australia and, ultimately, the High Court of Australia will increase tremendously the costs of judicial review and will exacerbate the problems of delay inherent in any system of judicial review of administrative action.[136]

The difficulties of creating a general appeal authority in which one would be content with the abilities of its members to handle appeals from a vast range of jurisdictions, plus all the costs of operating such a system, mean that this constitutes a dubious system for Canada. On the other hand, efficiencies and better decision making might be achieved in the existing system by combining, in one appeal body, the existing appeal jurisdictions for a number of related areas. It was, of course, this very promising kind of experiment, the Quebec Professions Tribunal, that was called into question in *Crevier v. Attorney General of Quebec*.[137]

As far as the grounds of judicial review are concerned, there are grave difficulties in the path of trying to achieve anything through direct, general legislation. The interrelationship between the courts and the administrative process is not amenable to precise definition or specification such as one normally expects from a statute.[138] Thus, while one might argue that the present perceived posture of the Supreme Court of Canada's undifferentiating deference toward the decisions of administrative tribunals is inappropriate, the answer to that is surely not a statutory enactment such as the Bumpers Amendment, with its instruction to decide all questions of law independently. All that would achieve, if taken up by the courts, would be an undifferentiating approach of the opposite kind: no respect for the expertise of administrative tribunals. Indeed, even assuming a general philosophy of deregulation and harnessing of all statutory authorities, there are serious reasons to doubt the viability of such an approach. As one critic of the Bumpers Amendment has commented:

> A statute that prescribes the scope of judicial review for an entire government's activities is not a suitable battleground for a campaign against over-regulation.[139]

The thrust of this comment is that, given the range of regulation in our society, it is inevitable that neither universal deference nor universal lack of deference can be the appropriate solution. The appropriate stance in any particular case will depend upon the interreaction of a range of factors having to do with the general nature of the decision-making function subject to review, and with the individual circumstances of the case before the court. Given that, the prospects for a useful codification are not great even for one listing the factors a court may or must take into account. However, there may be room for the development of particular standards of review within the context of specific statutes and their statutory appeal and review provisions. To end with a quote from Professor John Willis, writing of the generalist thrust of much of the McRuer Commission's recommendations: "The principle of uniqueness is the principle for me."[140]

Conclusions

Up to now, this paper has not been explicit as to why administrative tribunals are a part of Canada's system of government. However, much of the discussion has been pregnant with explanations for the selection of this route for so much of the important decision making of our polity. If there is a clinching argument for the creation of administrative tribunals, it lies in the need for the dispersal of power in a system which would otherwise (and perhaps even despite administrative tribunals) contain too much concentration of governmental authority in a limited group of actors: Parliament, the executive, the civil service and the courts.

The creation of administrative tribunals has at least the healthy tendency of distributing political power somewhat more evenly throughout the various constituencies that make up our nation. This is particularly so when the establishing of an administrative tribunal is linked with greater openness and direct participatory rights than are associated with the traditional forms of government.

Moreover, aside from considerations of democratic values, systemic factors also indicate the desirability for administrative tribunals, at least as an antidote to and variation upon the traditional modes of government. In a pluralistic society with complex governance problems there is obviously room, indeed a need, for flexibility and variety in the modes adopted for the handling of societal problems. To the extent that the functioning of traditional institutions (the legislature, the courts, civil service and, to a lesser extent perhaps, the executive) is hidebound by tradition, rendering effective reform a virtual impossibility, the administrative tribunal, particularly given the diversity of its form, presents an important possibility for effective governmental decision making. In this regard, the advocates for constitutional purity and the worriers over the anachronistic qualities of

administrative tribunals are sadly misguided. Obsolescent theory has prevented an adequate vision of the potential of diversified decision-making mechanisms. A single, uniform mould never was and never can be appropriate to administrative tribunals in our society.

Of course, it could be argued that a diffusion of power of the kind discussed here leads to weak or ineffective government. The more decision making is decentralized, the more difficult it is to regulate the private sector effectively. These considerations are substantial. Nevertheless, given the extent of government regulation of the private sector, there is in fact a certain inevitability about the diffusion of power, if there is any expectation that regulation will be informed, competent and effective. Under such a system, the Cabinet is responsible for major policy initiatives and ensures their integration into the diverse forums responsible for relatively specific areas of policy development and regulation.

The best of administrative (and in particular major regulatory) tribunals also add another dimension to the possibilities of government in that they offer the opportunity for an accommodation being reached between a number of often competing values in our society: legal, political (in its less than best sense), technical, economic and social. Given an appropriate configuration of tribunal decision-making powers, there may well be a much greater chance of that kind of decision making than is presently given by the other agencies of our governance.

To these considerations can be added the explanations traditionally advanced as justifications for the creation of administrative tribunals: (a) on the one hand, need for an adjudicative setting for the determination of issues with respect to which the courts either lacked expertise or the will to deal with them in a socially appropriate manner, and (b) on the other, a desire on the part of the government to transfer matters to another forum in the hope either of greater expertise in the handling of the problem or of avoiding or decreasing political responsibility for the matter in question.

Given this diversity of reasons for the creation of administrative tribunals, and particularly given the fact that the movement in the direction of administrative tribunals is in itself part of a search for diversity in the forms of decision making, it has been one of the major thrusts of this paper that it is inappropriate to advocate a single form of tribunal decision making.

In situations where the task at hand involves adjudications of the type conventionally carried out by the courts, arguments for freedom from political interference and decision making by independent and impartial decision makers assume greater force. On the other hand, in matters of high political and social regulatory concern involving broad discretionary authority, it is neither surprising nor undesirable that the regulatory or tribunal process involves varying degrees of interaction with other areas of our governmental system. In this respect, there is much weight in Ratushny's assertion:

> The absence of uniformity represents a tremendous flexibility in the administrative process which is its greatest strength.[141]

However, despite the fact that a plea for flexibility suggests the undesirability of any systemic reform of or approach to the administrative tribunal process, it has been the thrust of this paper that there are certain transcending values that are important reference points in the structuring of any tribunal processes. These are most notably the restraints posed by the place of the traditional governmental institutions including the courts, and the general value of broad participatory rights in the decision-making process. Indeed, it is fair to assert that these factors are not simply there as countervailing or checking forces, but are potentially also genuine contributors to better decision making in the public interest.

Notes

This paper was completed in November 1984.

1. (Toronto: Queen's Printer, 1968–69).
2. A list of the tribunals studied can be found in the second section of the paper.
3. Frans F. Slatter, *Parliament and Administrative Agencies* (Ottawa: Minister of Supply and Services Canada, 1982).
4. Lucinda Vandervort, *Political Control of Independent Administrative Agencies* (Ottawa: Minister of Supply and Services Canada, 1979).
5. *Judicial Review and the Federal Court*, Law Reform Commission of Canada, Report 14 (Ottawa: Minister of Supply and Services Canada, 1980).
6. *Independent Administrative Agencies*, Law Reform Commission of Canada, Working Paper 25 (Ottawa: Minister of Supply and Services Canada, 1980).
7. Economic Council of Canada, *Responsible Regulation: An Interim Report* (Ottawa: Minister of Supply and Services Canada, 1979); and Economic Council of Canada, *Reforming Regulation* (Ottawa: Minister of Supply and Services Canada, 1981).
8. (Ottawa: Minister of Supply and Services Canada, 1979).
9. (Ottawa: Minister of Supply and Services Canada, 1980).
10. As required for the construction of interprovincial and international pipelines by sections 25, 27(a) and 44 of the National Energy Board Act, R.S.C. 1970, c. N-6 as amended.
11. This is in fact a very rough statistical analysis, based on a count of the adjudicative-style tribunals established explicitly by statute. It does not take account of tribunals established by subordinate legislation or informally under statutory powers.
12. Fuel Petroleum Products Act, R.S.S. 1978, c. F-23; Mineral Taxation Act, R.S.S. 1978, c. M-17; Natural Gas Development and Conservation Board Act, R.S.S. 1978, c. N-2; Natural Products Marketing Act, R.S.S. 1978, c. N-3; Oil and Gas Conservation Act, R.S.S. 1978, c. O-2; Oil Well Income Tax Act, R.S.S. 1978, c. O-31; Potash Development Act, R.S.S. 1978, c. P-18; Surface Rights Acquisition and Compensation Act, R.S.S. 1978, c. S-65.
13. In some instances, the legislation involves occupations known in 1945 (e.g., Chiropody Profession Act, R.S.S. 1978, c. C-9); in others the occupations regulated have developed since then (e.g., Denture Technicians Act, R.S.O. 1980, c. 114).
14. *Independent Administrative Agencies*, at pp. 30–31.
15. Authority was transferred to the Board from the Railway Committee of the Privy Council by the Railway Act of that year (S.C. 1903, c. 58).
16. Canadian Broadcasting Act, S.C. 1936, c. 24.
17. Aeronautics Act, S.C. 1944, c. 28.

18. Employment and Social Insurance Act, S.C. 1935, c. 38.
19. S.O. 1971, c. 47 (now R.S.O. 1980, c. 404).
20. See Expropriations Act, R.S.O. 1980, c. 148, ss. 4-8 and Expropriation Procedure Act, R.S.S. 1978, c. E-16, s. 7.
21. Thus, in *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission (No. 2)*, [1980] 1 F.C. 396 (C.A.), Le Dain J. (at 405) noted the participation of the League under its former name, the Canadian Radio League, both before the Supreme Court of Canada and the Judicial Committee of the Privy Council in the *Radio Reference*: [1931] S.C.R. 541 and [1932] A.C. 304 (P.C.(Can.)).
22. Particularly since the decision of the Supreme Court of Canada in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311 in which the Supreme Court held that procedural fairness obligations could apply to administrative as well as to judicial and quasi-judicial functions.
23. See *C.R.T.C. Telecommunications Rules of Procedure*, SOR/79-554 and the *General Rules of the C.T.C.*, SOR/83-448. See also Hudson N. Janisch, "The New General Rules of the Canadian Transportation Commission" 1 *Administrative Law Reports* 173–81.
24. See e.g., the Broadcasting Act, R.S.C. 1970, c. B-11, s. 19 as amended, making public hearings mandatory for some matters and giving the CRTC a discretion as to the holding of a public hearing on other matters.
25. Both initiated by tribunals themselves and also flowing from the judgment of the Federal Court of Appeal in *Re Canadian Radio-television Commission and London Cable T.V. Ltd.*, [1976] 2 F.C. 621.
26. In the *London Cable* case, *ibid.*, at p. 623, it was suggested that there was a difference between staff studies and materials generated by the parties. More recently, the Federal Court of Appeal has drawn a distinction in the area of staff documents between matters of fact and evidence which should be revealed if not otherwise available, and matters of advice and opinion which need not be revealed. See *Toshiba Corporation et al. v. Anti-Dumping Tribunal* (1984), 8 Administrative Law Reports 173 (F.C.A.) and *Trans Quebec and Maritimes Pipeline Inc. v. National Energy Board* (1984), 54 N.R. 303 (F.C.A.).
27. For a long time, the only general "notice and comment" requirement in federal legislation was in the Broadcasting Act, R.S.C. 1970, c. B-11, s. 16(2) which required the CRTC to give notice in the *Canada Gazette* of proposed regulations and an opportunity to "licensees and other interested persons to make representations with respect thereto."
28. For a recent consideration of the great advances in this area, see Hudson N. Janisch, "Note — Developments in Procedures for Rule Making in Canada," unpublished paper, Canadian Bar Association, Administrative Law subsection, Ottawa Branch, February 1984.
29. E.g., *Toshiba Corporation et al. v. Anti-Dumping Tribunal* (1984), 8 Administrative Law Reports 173 (F.C.A.).
30. See e.g., *Re Islands Protection Society and the Queen in Right of British Columbia* (1979), 98 D.L.R. (3d) 504 (B.C.S.C.).
31. Compare *Inuit Tapirisat of Canada v. Governor in Council*, [1980] 2 S.C.R. 735 with *Gray Line of Victoria v. Chabot*, [1981] 2 W.W.R. 635 (B.C.S.C.).
32. See e.g., *Re Rothman's of Pall Mall Canada and Minister of National Revenue (No. 1)*, [1976] 2 F.C. 500 (C.A.).
33. For an argument recommending very circumscribed judicial imposing of procedures on statutory authorities, see Martin Loughlin, "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" 28 *University of Toronto Law Journal* 215–41.
34. Part I of the Constitution Act, 1982 (enacted by Canada Act, 1982, c. 11 (U.K.).
35. R.S.C. 1970, Appendix III.
36. R.S.A. 1980, c. A-2.
37. See *Canadian Press*, March 15, 1984, 12.29 EST.
38. In this regard, the best example remains the resistance to the jurisdiction of the Ontario

Human Rights Commission featured in *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756, a resistance finding very close parallels at the present time in the challenge of Mr. MacBain, M.P. to the processes of the Canadian Human Rights Commission. See *MacBain v. Canadian Human Rights Commission et al.* (1984), 7 Administrative Law Reports 233 (F.C., T.D.).

39. *Lipkovits v. C.R.T.C.* (1982), 45 N.R. 383 (F.C.A.).
40. *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.
41. *In Nicholson, ibid.*, p. 278, Laskin C.J.C. gives the Board the option of proceeding by way of either oral or paper hearing.
42. *Lipkovits, Re Davidson and Disciplinary Board of Prison for Women* (1981), 61 C.C.C. (2d) 520 (F.C., T.D.).
43. *C.R.T.C. v. C.T.V. Television Network Ltd.*, [1982] 1 S.C.R. 530.
44. 419 U.S. 565 (1975) et al.
45. David L. Kirp, "Proceduralism and Bureaucracy: Due Process in the School Setting" 28 *Stanford Law Review* 841–76.
46. See Brian Jenks, "The 'New Administrative Law': Some Assumptions and Questions" 41 *Australian Journal of Public Administration* 209–18.
47. For an account of this affair, see Joseph C. Goulden, *The Superlawyers* (New York: Dell, 1973), at pp. 191–95.
48. See "Court decision blow to Hydro minister says," *Toronto Star*, August 18, 1984 commenting on the effects of *Re Central Ontario Coalition Concerning Hydro Transmission Systems et al. and Ontario Hydro* (1981), 8 Administrative Law Reports 81 (Ont. J.C., Div. Ct.), a decision upsetting an electrical transmission expansion scheme on procedural grounds.
49. Most notably sections 1 and 2(c) of the Bill of Rights and sections 7 and 11 of the Charter.
50. The provisions of section 2 of the Bill of Rights may be overridden by an express declaration that an Act governs notwithstanding the Bill of Rights while section 33 of the Charter provides a mechanism for legislative avoidance of, inter alia, sections 7 and 11. Even without that mechanism, conflicting laws may also be sustained under section 1 and its limitation on the application of the Charter within "such reasonable limits . . . as can be demonstrably justified in a free and democratic society."
51. See John D. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the *Charter*" 14 *Manitoba Law Journal* 455–76 at p. 456.
52. E.g., *The Queen v. Fisherman's Wharf* (1982), 135 D.L.R. (3d) 307 (N.B.Q.B.). However, see the apparent rejection of the argument in the decision of LaForest J.A. in the New Brunswick Court of Appeal: (1982), 144 D.L.R. (3d) 21, 31 (*sub nom. The Queen in right of New Brunswick v. Estabrooks Pontiac Buick Ltd., et al.).*
53. See e.g., *Re Law Society of Manitoba and Savino* (1983), 1 D.L.R. (4th) 285 (Man. C.A.); *Re James* (1982), 42 B.C.L.R. 10 (S.C.). Cf *Re Lazarenko and Law Society of Alberta* (1983), 4 D.L.R. (4th) 389 (Alta.Q.B.).
54. *MacBain v. Canadian Human Rights Commission* (1984) 7 Administrative Law Reports 233 (F.C., T.D.).
55. *Ibid.*
56. *Russell v. Radley* (1984), 5 Administrative Law Reports 39 (F.C., T.D.).
57. The British Columbia legislature has passed a formal resolution calling for the addition of "property rights" to section 7.
58. However, see the cursory consideration and rejection of this argument by Huband J.A. in *Manitoba Society of Seniors v. Greater Winnipeg Gas Co.* (1982), 18 Man. R. (2d) 440, 443 (C.A.).
59. 73 *Yale Law Journal* 733–87.
60. At pp. 140–41.
61. *Ibid.*, at p. 141.
62. Administrative Procedures Act, R.S.A. 1980, c. A-2, s. 3.

63. See Statutory Powers Procedure Act, R.S.O. 1980, c. 484, s. 3(1), which makes the Act's procedural code applicable where either compliance is required by the statutory authority's constituent Act or a "statutory power of decision" [section 1(d)] is involved which is "required by . . . [common] law to hold or to afford to the parties to the proceedings an opportunity for a hearing before making a decision."
64. *Independent Administrative Agencies*, at p. 141.
65. For a detailed consideration of the existing common law position leading in fact to the imposition of an obligation to give reasons, see in *Re Pacific Western Airlines Ltd.* (1984), 9 Administrative Law Reports 109 (C.T.C.).
66. *Independent Administrative Agencies*, at p. 130.
67. *Ibid.*, at pp. 132–34.
68. Administrative Procedure Act, 5 U.S.C.A., ss. 1305, 3105, 3344, 5362 and 7521.
69. And subsequently given statutory confirmation: 92 U.S. Stats. 183 (1978).
70. See K.C. Davis, 3 *Administrative Law Treatise* 2nd ed. (San Diego: K.C. Davis, 1980), 17.11 – 17.19 (pp. 312–39).
71. *Independent Administrative Agencies*, at pp. 133–34.
72. *Ibid.*, at pp. 184-86. See also Alan Leadbetter, *Council on Administration* (Ottawa: Minister of Supply and Services Canada, 1980).
73. As provided for in Part II of the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484.
74. Established by the Tribunals and Inquiries Act, 1958 (U.K.) and now the Tribunals and Inquiries Act, 1971, c. 62 (U.K.). See Leadbetter, *Council on Administration*, at pp. 21–31.
75. As established by the Administrative Appeals Tribunal Act 1975, s. 48 (Cth). See Leadbetter, *Council on Administration*, at pp. 48–50.
76. S.C. 1980–8183, c. 111, Schedule 1.
77. Freedom of Information Act, S.N.S. 1977, c. 10; Right to Information Act, S.N.B. 1978, c. R.-103; Freedom of Information Act, S.N. 1979, c. 6; Access to Documents Act, S.Q. 1982, c. 30 (proclaimed in force from July 1984).
78. "Subsection 2(1): The purpose of this Act is to extend the present laws of Canada. . . . Subsection 2(2): This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public."
79. *Re Dale Corporation and Rent Review Commission et al.* (1983), 149 D.L.R. (3d) 113, 121 (N.S.C.C., A.D.).
80. *Toshiba Corporation et al. v. Anti-Dumping Tribunal* (1984), 8 Administrative Law Reports 173 (F.C.A.).
81. *Ibid.* See also *Trans Quebec and Maritimes Pipeline Inc. v. National Energy Board* (1984), 54 N.R. 303 (F.C.A.).
82. *Denton v. Auckland City*, [1969] N.Z.L.R. 256 (S.C.).
83. Administrative Procedure Act, 1946, 5 U.S.C., Chapter 5. I develop the arguments for a general "notice and comment obligation" more fully in *Rule-Making Hearings: A General Statute for Ontario*, Research Publication 9, Ontario Commission on Freedom of Information and Individual Privacy, 1979. See also *Independent Administrative Agencies*, at p. 114ff; *Responsible Regulation*, at pp. 72–77; and *Report of the House of Commons Special Committee on Regulatory Reform* (Ottawa: Minister of Supply and Services Canada, 1981), at pp. 4–6.
84. See *Independent Administrative Agencies*, at pp. 116–17.
85. See *Inuit Tapirisat of Canada v. Leger*, [1979] 1 F.C. 710, 721 (C.A.). As a result, Le Dain J., delivering the judgment of the Court, would not have obliged revelation of the CRTC's submissions (or those of other governmental sources) to Cabinet on an appeal under section 64(1) of the National Transportation Act, R.S.C. 1970, c. N-17. However, different questions were held to be raised by the submissions of Bell Canada, one of the parties (722). However, on further appeal, the Cabinet's function was held not to be attended by any duty of procedural fairness: *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2. S.C.R. 735. The notion of Cabinet secrecy

is also reaffirmed very strongly in the Access to Information Act, S.C. 1980–81–82–83, c. 111, Schedule 1, s. 69.

86. The recommendations of the Peterson Committee do not go this far, though they accept the need for some procedural protections: 18–19. See also the judgment of Le Dain J., *ibid.*

87. Richard Schultz, "Regulatory Agencies and the Dilemmas of Delegation" in *Essays in Honour of J.E.S. Hodgetts*, edited by O.P. Dwivedi (Toronto: University of Toronto Press, 1982), 89–106, at p. 103.

88. See *Report of the Royal Commission on Financial Management and Accountability* (Ottawa: Minister of Supply and Services Canada, 1979), at pp. 315–16; *Independent Administrative Agencies*, at pp. 83–84.

89. Edward Ratushny, "Comment: The Legal Relationship Between Tribunals and Government," unpublished paper delivered to the Administrative Law Study Group, Ottawa, December 4, 5 and 6, 1983.

90. Richard Schultz, "Regulatory Agencies and the Dilemmas of Delegation," at p. 104; and Andrew Roman, "Governmental Control of Tribunals: Appeals, Directives and Non-Statutory Mechanisms," unpublished paper delivered to the Administrative Law Study Group, Ottawa, December 4, 5 and 6, 1984.

91. Andrew Roman and I develop the argument that the general public has a limited claim to participate in the proceedings of narrowly adjudicative tribunals in "*Minister of Justice of Canada v. Borowski*: The Extent of the Citizen's Rights to Litigate the Lawfulness of Government Behaviour (1984), 4" *Windsor Yearbook of Access to Justice* 303.

92. Sections 1(a) and 2(c).

93. Section 7. In both the Charter and the Bill, the references to an "independent and impartial tribunal" appear in sections respecting those charged with an offence (Charter: s. 11(a); Bill: s. 2(f)). However, there is little or no reason to believe that this principle is not also part of the general procedural entitlement provisions of those two instruments (Charter: s. 7 ("principles of fundamental justice"); Bill: ss. 1(a) ("due process of law") and 2(d) ("principles of fundamental justice")).

94. See *Report of the Royal Commission on Financial Management and Accountability*, at pp. 318–19; *Independent Administrative Agencies*, at p. 85; Schultz, "Regulatory Agencies and the Dilemmas of Delegation," at p. 104; and, most persuasively, Hudson N. Janisch, "Policy Making and Regulation: Towards a New Definition of the Status of Independent Agencies in Canada," 17 *Osgoode Hall Law Journal* 46–106, at pp. 105–6 (and at other places). However, cf. *Report of the Special Committee on Regulatory Reform*, rejecting the notion of mandatory procedures for the issuance of directives. The notion of procedural safeguards attaching to directive powers seemed to be accepted by the government in the broadcasting area in *Towards a New National Broadcasting Policy* (Ottawa: Minister of Supply and Services Canada, 1983), but no such procedures were found in the Bill tabled in the House of Commons on February 8, 1984.

95. E.g., Peter Gall, John Grant, and Murray Rankin, *The Cabinet and the Agencies: Toward Accountability in British Columbia*, Report to the Canadian Bar Association (British Columbia Branch), 1981, see major difficulties with both cabinet appeals and directives.

96. E.g., *Report of the Special Committee on Regulatory Reform*, at pp. 15–18.

97. E.g., Douglas Hartle, *Public Policy Decision-Making and Regulation* (Montreal: Institute for Research on Public Policy, 1979), at pp. 132–33.

98. Andrew Roman, "Cabinet Directives to Regulatory Agencies: A Bold Leap Backwards" 2 *Regulatory Reporter* 5-137-58, and pp. 142–43.

99. Schultz, "Regulatory Agencies and the Dilemmas of Delegation," at p. 104.

100. *Ibid.*

101. Roman, "Cabinet Directives and Regulatory Agencies: A Bold Leap Backwards," at pp. 5–157.

102. Note, however, that the CRTC and the CTC have authority to make regulations: Broadcasting Act, R.S.C. 1970, c. B-11, s. 16(1)(b) (subject to a notice and comment procedure:

s. 16(2)), and National Transportation Act, R.S.C. 1970, c. N-17, ss. 26(1), 46(1).

103. See, however, Antonio Scalia, "Back to Basics: Making Law Without Making Rules" 5 *Regulation* July/August, at p. 25.
104. *Martineau and Butters v. Matsqui Institution Disciplinary Board*, [1978] 1 S.C.R. 118, in which "directives" issued by the Commissioner of Penitentiaries under the Penitentiary Act, R.S.C. 1970, c. P-6, were held not to be "law."
105. S.C. 1976–77, c. 33 as amended.
106. *Responsible Regulation*, at p. 59.
107. *Report of the Royal Commission on Financial Management and Accountability*, at pp. 320–23.
108. *Report of the Special Committee on Regulatory Reform*, at pp. 19–20.
109. *Independent Administrative Agencies,* at pp. 160–67.
110. For an interesting tribunal decision supporting this notion, see the preliminary rulings of Kenneth Norman, Canadian Human Rights Tribunal, in *Noel Campbell et al. v. Hudson Bay Mining and Smelting Co. Ltd.* (1984), 7 Administrative Law Reports 249 (C.H.R.T.).
111. Cf. the Federal Court of Appeal's recent restrictive decision on the ambit of the bias rules in *Energy Probe v. Atomic Energy Control Board et al.* (1985), 11 Administrative Law Reports (F.C.A.), affirming (1984), 5 Administrative Law Reports 165, 183 (F.C., T.D.). In a somewhat different context, the Charter and its call in section 7 for observance of "the principles of fundamental justice" and section 11(d) for "a fair . . . hearing by an independent and impartial tribunal" is beginning to generate perhaps unfortunate challenges to the authority of tribunals that combine legislative, investigative, administrative and adjudicative roles. See *MacBain v. Canadian Human Rights Commission et al.* (1984), 7 Administrative Law Reports 233 (F.C., T.D.); and "OSC adjudication powers face challenge by Malantic," *Globe and Mail*, November 16, 1984. It remains to be seen whether these challenges will ultimately be successful. If they are, it may create a tendency for legislatures to look once again to the superior courts for the adjudication of such matters. That would be an unfortunate by-product.
112. Of course, there is always the danger that appointees will behave in the manner best calculated to ensuring their reappointment when renewal time comes, e.g., by appeasing government or the more influential constituencies. However, the danger of this kind of campaign for retaining lucrative agency positions is presumably far greater when there is no guaranteed tenure of office.
113. Hudson N. Janisch, "Public Interest Groups, Administrative Agencies and the Courts," unpublished paper, Osgoode Hall Law School of York University, December 1982, at p. 3.
114. *Ibid.*
115. Thus, an examination of the statutes in force in 1945 reveals a right of appeal to the regular courts from occupational disciplinary bodies and appeals on questions of "law and jurisdiction" from bodies such as the Board of Transport Commissioners: Railways Act, R.S.C. 1927, c. 170, s. 52(2), (3).
116. "Lawyers, Courts and the Rise of the Regulatory Process," draft of a paper to be delivered by R.C.B. Risk at the Dalhousie Law School's centennial celebrations, at pp. 15–16.
117. See particularly, Paul Weiler, "The 'Slippery Slope' of Judicial Intervention: The Supreme Court and Canadian Labour Relations 1950–70" 9 *Osgoode Hall Law Journal* 1–79; and Bora Laskin, "*Certiorari* to Labour Boards: The Apparent Futility of Privative Clauses" 30 *Canadian Bar Review* 986–1003.
118. Labour Code of British Columbia Act, S.B.C. 1973 (2nd Sess.), c. 122, ss. 33, 34(4) (now R.S.B.C. 1979, c. 215). See the discussions by Harry W. Arthurs, "The 'Dullest Bill': Reflections on the *Labour Code of British Columbia*" 9 *University of British Columbia Law Review* 281–340, at pp. 323–29; and Peter A. Gall, "Judicial Review of Labour Tribunals: A Functional Approach," *Proceedings of the Administrative Law Conference*, Faculty of Law, University of British Columbia, Vancouver, 1979: *University of British Columbia Law Review* 305–66, at pp. 330–55.

119. *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220.

120. *McEvoy v. Attorney General of New Brunswick* (1983), 148 D.L.R. (3d) 25 (S.C.C.).

121. E.g., *Canadian Union of Public Employees v. The Queen in Right of New Brunswick*, [1982] 2 S.C.R. 587.

122. S.O. 1971, c. 48, ss. 2(2), (3) (now R.S.O. 1980, c. 224) and their provisions for error of law and no evidence review. See John M. Evans, "Remedies in Administrative Law" in *Law Society of Upper Canada Special Lectures* (1981) 429–81, at pp. 446–66.

123. R.S.C. 1970, c. 10, (2nd Supp.) s. 28(1)(b) allows for review by the Federal Court of Appeal of all errors of law whether or not they appear on the face of the record; and s. 28(1)(c) gives review authority for ". . . an erroneous finding of fact . . . made in a perverse or capricious manner or without regard for the material before [the decision maker]."

124. See Ronald M. Levin, "Review of 'Jurisdictional' Issues Under the Bumpers Amendment" (1983) *Duke Law Journal* 355–87.

125. As set out, *ibid.*, pp. 356–57.

126. See *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979], 1 S.C.R. 711.

127. 73 *Yale Law Journal* 733–87.

128. The principal turning point in this regard was the decision of the Supreme Court of Canada in *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602.

129. For a more detailed discussion of the authorities, see David J. Mullan, "Unfairness in Administrative Processes," Isaac Pitblado Lectures on Advocacy, *Rights and Remedies — New Developments* (Winnipeg: Legal Studies Office, Law Society of Manitoba, 1983) 68–99, at pp. 79–82.

130. "Anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

131. [1959] S.C.R. 121.

132. Broad privative clauses are also found in Workers' Compensation statutes to protect the decisions of Workers' Compensation Boards from judicial review. See e.g., Workmen's Compensation Act, R.S.O. 1980, c. 539, s. 75.

133. Peter W. Hogg, "The Supreme Court of Canada and Administrative Law, 1949–71" 11 *Osgoode Hall Law Journal* 187-223, at pp. 188–91. See also Peter W. Hogg, "Judicial Review: How Much Do We Need?" 20 *McGill Law Journal* 157–212.

134. *Independent Administrative Agencies*, at pp. 180–81.

135. *Ibid.*, at p. 179.

136. I develop these arguments more fully in "Alternatives to Judicial Review of Administrative Action: The Commonwealth of Australia Administrative Appeals Tribunal" 43 *Revue du Barreau* 569–94.

137. [1981] 2 S.C.R. 220.

138. Cf. the proposals of the Law Reform Commission of Canada for the codification or specification of the grounds of judicial review: *Judicial Review and the Federal Court*, at p. 32, now taken up by the Department of Justice in its proposals for the amendment of the *Federal Court Act: Proposals to Amend the Federal Court Act* (Ottawa: Department of Justice, 1983), at p. 11.

139. Levin, "Review of 'Jurisdictional' Issues Under the Bumpers Amendment," at p. 387.

140. John Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" 18 *University of Toronto Law Journal* 351–60, at p. 359.

141. Ratushny, "The Legal Relationship Between Tribunals and Governments," at p. 5.

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